No. 21697

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FORD M. CONVERSE, APPELLANT,

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR,

APPELLEE,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRIEF FOR THE APPELLANT

William B. Murray
Attorney for Appellant
525 Failing Building
Portland, Oregon 97204

INDEX

Index cont'd.

INDEX OF AUTHORITIES CITED

Index of Authorities cont'd.

STATUTES and REGULATIONS

TREATISES AND MISCELLANEOUS

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 21697

FORD M. CONVERSE, APPELLANT,

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR,

APPELLEE,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRIEF FOR THE APPELLANT

NATURE OF THE CASE

Ford M. Converse appeals from a summary judgment of the District Court for Oregon affirming a decision of an assistant solicitor for the Secretary of the Interior. The administrative decision made the surface resources of the Edith and Paymaster lode claims[1]. subject to the limitations and restrictions of section 4 of the Act of July 23, 1955,[2]. on the ground that the locator had failed to make discovery of a valuable mineral deposit within the purview of the mining laws prior to that date.

1./ Edith and Paymaster lode claims in Secs. 1 and 2, T. 12 S., R. 4 E., W. M., Oregon, recorded in Book 8, pages 214, 215, Official Records, Linn County, Oregon.

2. 30 USC §613 (c) set forth infra. p. 6.

Converse maintains that the administrative decision did not give to the established facts their correct legal significance. It did not apply properly the long-established rule of mineral discovery which the solicitor purported to follow.

Title to mining claims depends upon mineral discovery. This administrative departure from the settled law of discovery does more than diminish the appellant's property rights in the claims he has located; it disturbs the foundation on which title to all located mining claims rests. Therefore, this case is important to the industry upon which our nation depends for metals.

STATEMENT OF PLEADINGS AND JURISDICTIONAL FACTS

Converse filed a complaint seeking judicial review of the administrative proceeding which had been initiated by the Forest Service, United States Department of Agriculture , and heard and determined by the Department of the Interior.

Converse alleged: He is a citizen of Oregon. Stewart L. Udall is the Secretary of the Interior of the United States.R 1. The mining claims are in Oregon. R 2. The amount in controversy exceeds $10,000. R 2. Converse had exhausted his administrative remedies. R 2. He charged that the Secretary was clearly wrong as a matter of law in listed particulars. R 3.

The Secretary moved for summary judgment based on the administrative file, marked Exhibit 1, attached in support of his motion. This exhibit contained the administrative record, the exhibits and the transcript of the testimony before the Hearing Examiner.

The District Court allowed the Secretary's motion for summary judgment R 29, and affirmed the administrative decision. R 50.

Converse filed a motion for reconsideration. R 51. Briefs were filed, R71, R 84. An order denying the motion was entered. R 89. Notice of appeal, R 93, bond, R 95, designation of record, R 96, and points on appeal, R 98, were duly filed.

We agree with the Secretary's statement that: "The primary dispute in this case is not over the facts but over the legal significance to be given to the established facts." R 24. Our differences are questions of law.

JURISDICTION OF THE UNITED STATES DISTRICT COURT

The District Court of the United States had jurisdiction of this action under the Administrative Procedure Act of June 11, 1946, 60 Stat. 243, 5 USC §1009; the Act of June 25, 1948, as amended, 62 Stat. 964, 28 USC §§ 2201, 2202, whereby relief is provided by declaratory judgments; the Act of June 25, 1948, Ch. 646, 62 Stat. 930, 28 USC §1331, as amended, with respect to actions arising out of the Constitution and laws of the United States; the Act of October 5, 1962, 76 Stat. 744, 28 USC §1361, §1391, which authorizes action to compel an officer of the United States to perform his official duty with respect to real property; and the inherent power of the Court to grant injunctive relief in the premises.

JURISDICTION OF THE UNITED STATES COURT OF APPEALS

The jurisdiction of this honorable Court arises under 28 USC §1291.

QUESTIONS PRESENTED

1. Whether an administrative attempt to exercise power over mining claims under the Surface Resources Act is a nullity when there is an administrative failure to comply with mandatory statutes as to the manner and circumstances under which agency power may be exercised.

2. Whether a discovery of a lode in mining claims mineral in character, containing ores of higher average values than similar ores mined in the United States, is a discovery as a matter of law.

3. Whether the existence of a mineral discovery under the mining law depends upon the name given to the kind of further work a reasonably prudent man would be justified in performing on a mineral lode - "exploration" or "development".

4. Whether an administrative agency is required to make requested findings of fact under the Administrative Procedure Act, when those facts are supported by substantial evidence and are uncontroverted.

5. Whether refusal in an administrative proceeding to allow offers of proof for the record on appeal is a denial of a heraing under the Administrative Procedure Act and a denial of "Due Process".

6. Whether a hearing examiner is disqualified under the Administrative Procedure Act from hearing a case when he has signed a notice of hearing asserting the charges at the direction of the prosecuting agency.

STATUTES INVOLVED

Surface Resources Act - 30 USC §613 (a), (c), (e):

§ 613. Procedure for determining title uncertainties—Notice to mining claimants; request; publication; service

(a) The head of a Federal department or agency which has the responsibility for administering surface resources of any lands belonging to the United States may file as to such lands in the office of the Secretary of the Interior, or in such office as the Secretary of the Interior may designate, a request for publication of notice to mining claimants, for determination of surface rights, which request shall contain a description of the lands covered thereby, showing the section or sections of the public land surveys which embrace the lands covered by such request, or if such lands are unsurveyed, either the section or sections which would probably embrace such lands when the public land surveys are extended to such lands or a tie by courses and distances to an approved United States mineral monument.

The filing of such request for publication shall be accompanied by an affidavit or affidavits of a person or persons over twenty-one years of age setting forth that the affiant or affiants have examined the lands involved in a reasonable effort to ascertain whether any person or persons were in actual possession of or engaged in the working of such lands or any part thereof, and, if no person or persons were found to be in actual possession of or engaged in the working of said lands or any part thereof on the date of such examination, setting forth such fact, or, if any person or persons were so found to be in actual possession or engaged in such working on the date of such examination, setting forth the name and address of each such person, unless affiant shall have been unable through reasonable inquiry to obtain information as to the name and address of any such person, in which event the affidavit shall set forth fully the nature and results of such inquiry.

The filing of such request for publication shall also be accompanied by the certificate of a title or abstract company, or of a title abstractor, or of an attorney, based upon such company's abstractor's, or attorney's examination of those instruments which are shown by the tract indexes in the county office of record as affecting the lands described in said request, setting forth the name of any person disclosed by said instruments to have an interest in said lands under any unpatented mining claim heretofore located, together with the address of such person if such address is disclosed by such instruments of record. "Tract indexes" as used herein shall mean those indexes, if any, as to surveyed lands identifying instruments as affecting a particular legal subdivision of the public land surveys, and as to unsurveyed lands identifying instruments as affecting a particular probable legal subdivision according to a projected extension of the public land surveys.

Thereupon the Secretary of the Interior, at the expense of the requesting department or agency, shall cause notice to mining claimants to be published in a newspaper having general circulation in the county in which the lands involved are situate.

Such notice shall describe the lands covered by such request, as provided heretofore, and shall notify whomever it may concern that if any person claiming or asserting under, or by virtue of, any unpatented mining claim heretofore located, rights as to such lands or any part thereof, shall fail to file in the office where such request for publication was filed (which office shall be specified in such notice) and within one hundred and fifty days from the date of the first publication of such notice (which date shall be specified in such notice), a verified statement which shall

Hearings

(c) If any verified statement shall be filed by a mining claimant as provided in subsection (a) of this section, then the Secretary of Interior shall fix a time and place for a hearing to determine the validity and effectiveness of any right or title to, or interest in or under such mining claim, which the mining claimant may assert contrary to or in conflict with the limitations and restrictions specified in section 612 of this title as to hereafter located unpatented mining claims, which place of hearing shall be in the county where the lands in question or parts thereof are located, unless the mining claimant agrees otherwise. Where verified statements are filed asserting rights to an aggregate of more than twenty mining claims, any single nearing shall be limited to a maximum of twenty mining claims unless the parties affected shall otherwise stipulate and as many separate hearings shall be set as shall be necessary to comply with this provision. The procedures with respect to notice of such a hearing and the conduct thereof, and in respect to appeals shall follow the then established general procedures and rules of practice of the Department of the Interior in respect to contests or protests affecting public lands of the United States. If, pursuant to such a hearing the final decision rendered in the matter shall affirm the validity and effectiveness of any mining claimant's so asserted right or interest under the mining claim,

Failure to deliver or mail copy of notice

(e) If any department or agency requesting publication shall fail to comply with the requirements of subsection (a) of this section as to the personal delivery or mailing of a copy of notice to any person, the publication of such notice shall be deemed wholly ineffectual as to that person or as to the rights asserted by that person and the failure of that person to file a verified statement, as provided in such notice, shall in no manner affect, diminish, prejudice or bar any rights of that person. July 23, 1955, c. 375, § 5, 69 Stat. 369, amended June 11, 1960, Pub.L. 86–507, § 1(26), 74 Stat. 201.

Code of Federal Regulations Title 43 Chapter 1 Subpart C Contests and Protests January 1, 1962

SUBPART C—CONTESTS AND PROTESTS [1]

PRIVATE CONTESTS AND PROTESTS

§ 221.51 *By whom private contest may be initiated.* Any person who claims title to or an interest in land adverse to any other person claiming title to or an interest in such land or who seeks to acquire a preference right pursuant to the act of May 14, 1880, as amended (43 U. S. C. 185), or the act of March 3, 1891 (43 U. S. C. 329), may initiate proceedings to have the claim of title or interest adverse to his claim invalidated for any reason not shown by the records of the Bureau of Land Management. Such a proceeding will constitute a private contest and will be governed by the regulations in this part.

[1] In addition to the material under this heading, the general provisions under Subpart D of this part should be consulted.

§ 221.52 *Protests.* Where the elements of a contest are not present, any objection raised by any person to any action proposed to be taken in any proceeding before the Bureau will be decmed to be a protest and such action thereon will be taken as is deemed to be appropriate in the circumstances.

§ 221.53 Initiation of contest.

Any person desiring to initiate a private contest must file a complaint in the land office which has jurisdiction over the land involved, or, if there is no such land office, in the Office of the Director, Bureau of Land Management, Washington 25, D.C. The contestant must serve a copy of the complaint on the contestee not later than 30 days after filing the complaint and must file proof of such service, as required by § 221.95, in the office where the complaint was filed within 30 days after service.

§ 221.54 *Contents of complaint.* The complaint shall contain the following information, under oath:

(a) The name and address of each party interested, including the age of each heir of any deceased entryman.

(b) A legal description of the land involved.

(c) A reference, so far as known to the contestant, to any proceedings pending for the acquisition of title to, or an interest in, such land.

(d) A statement in clear and concise language of the facts constituting the grounds of contest.

(e) A statement of the law under which contestant claims or intends to acquire title to, or an interest in, the land and of the facts showing that he is qualified to do so.

(f) A statement that the proceeding is not collusive or speculative but is instituted and will be diligently pursued in good faith.

(g) A request that the contestant be allowed to prove his allegations and that the adverse interest be invalidated.

(h) The office in which the complaint is filed and the address to which papers shall be sent for service on the contestant.

(i) A notice that unless the contestee files an answer to the complaint in such office within 30 days after service of the notice, the allegations of the complaint will be taken as confessed.

CODIFICATION: In § 221.54, the last sentence reading as follows: "If the complaint does not meet each of these requirements, it will be summarily dismissed." was deleted by Circular 1962, 21 F. R. 7622, Oct. 4, 1956.

§ 221.58 *Service.* (a) The complaint must be served upon every contestee. If the contestee is of record in the land office, service may be made and proved as provided in § 221.95. If the person to be served is not of record in the land office, proof of service may be shown by a written statement of the person who made personal service, by post-office return receipt showing personal delivery, or by an acknowledgment of service. In certain circumstances, service may be made by publication as provided in § 221.60.

§ 221.64 *Answer to complaint.* Within 30 days after service of the complaint or after the last publication of the notice, the contestee must file in the office where the contest is pending an answer specifically meeting and responding to the allegations of the complaint, together with proof of service of a copy of the answer upon a contestant as provided in § 221.95. The answer shall contain or be accompanied by the address to which all notices or other papers shall be sent for service upon contestee.

§ 221.65 *Action by Manager.* (a) If an answer is not filed as required, the allegations of the complaint will be taken as admitted by the contestee and the Manager will decide the case without a hearing.

§ 221.68 *Proceedings in Government contests.* The proceedings in Government contests shall be governed by the rules relating to proceedings in private contests

Adminstrative Procedure Act 5 USCA §1005 (b)

Issuance of process; investigations; transcript of evidence.

(b) No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law. Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

Administrative Procedure Act 5 USCA §1004 (c) :

Authority and functions of officers and employees

(c) The same officers who preside at the reception of evidence pursuant to section 1006 of this title shall make the recommended decision or initial decision required by section 1007 of this title except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 1007 of this title except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

STATEMENT OF FACTS

Government's Case in Chief

Lodes Discovered: Contestant called three witnesses to establish its case in chief.[1.] Contestant's map, Exhibit C, shows the Converse lode on the Edith and Paymaster claims, and their proximity to the Riverside (Kroeplin) claims to the Northwest, and to the Risley claims to the North. R 152. All of these claims lie along the same major fracture in the earth's crust, Tr 75. This major structure extends approximately four miles from the Converse claims

---

1./ WITNESS Contestant's	DIRECT	CROSS	REDIRECT	RECROSS
Ford M. Converse	8	16	27	30
Milvoy M. Suchy	34	53		

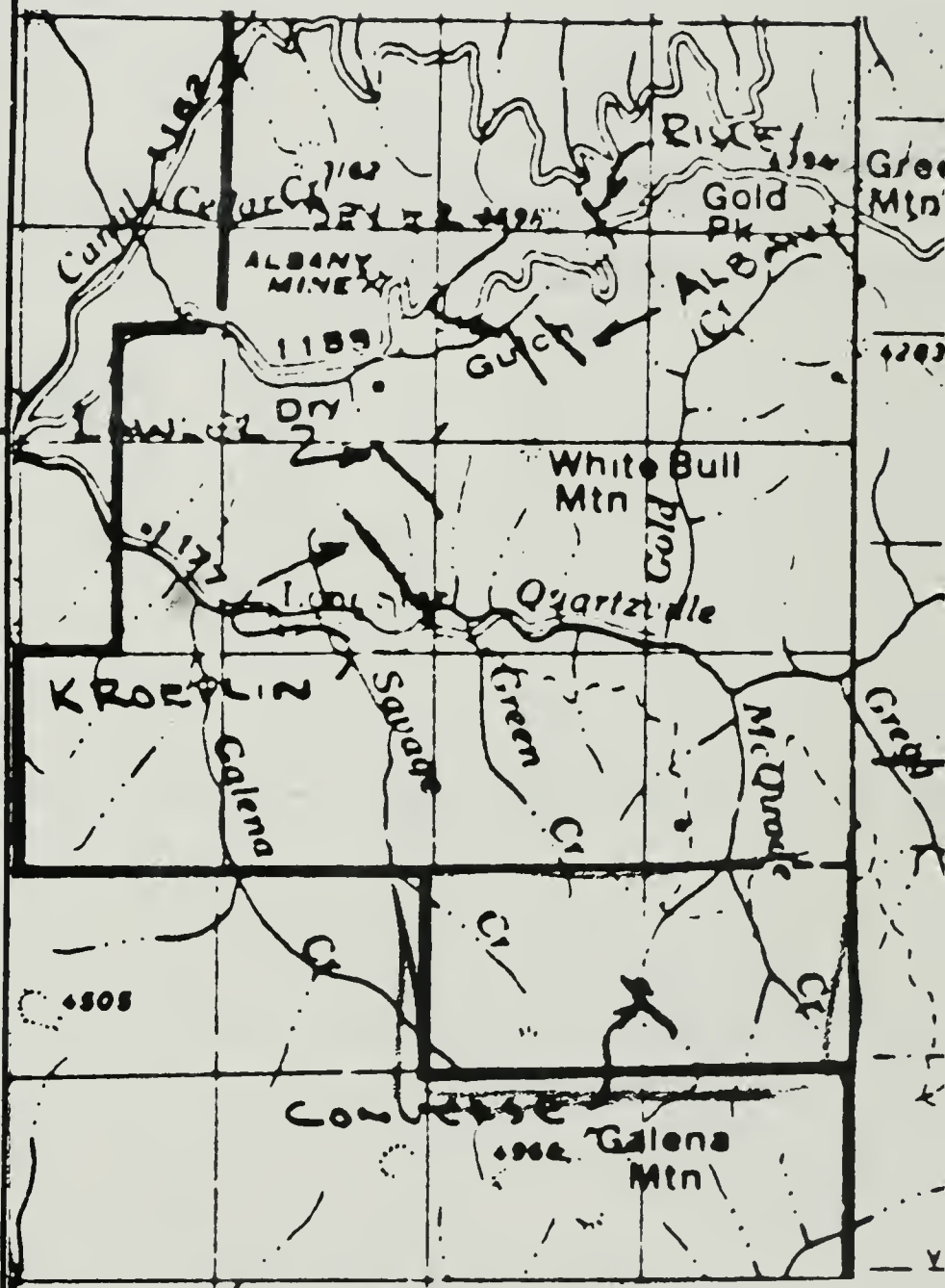
Exhibit No. C Docket No. 01195-D

Hearing US v Converse

Offered by Lucky Date 6-11-67

Reporter Montgomery

This map has been enlarged from
Exhibit C R 152



WILLAMETTE NATIONAL FOREST

OREGON

1960

CASCADIA RANGER DISTRICT

Scale

0 1/2 1 2 Mi

LEGEND

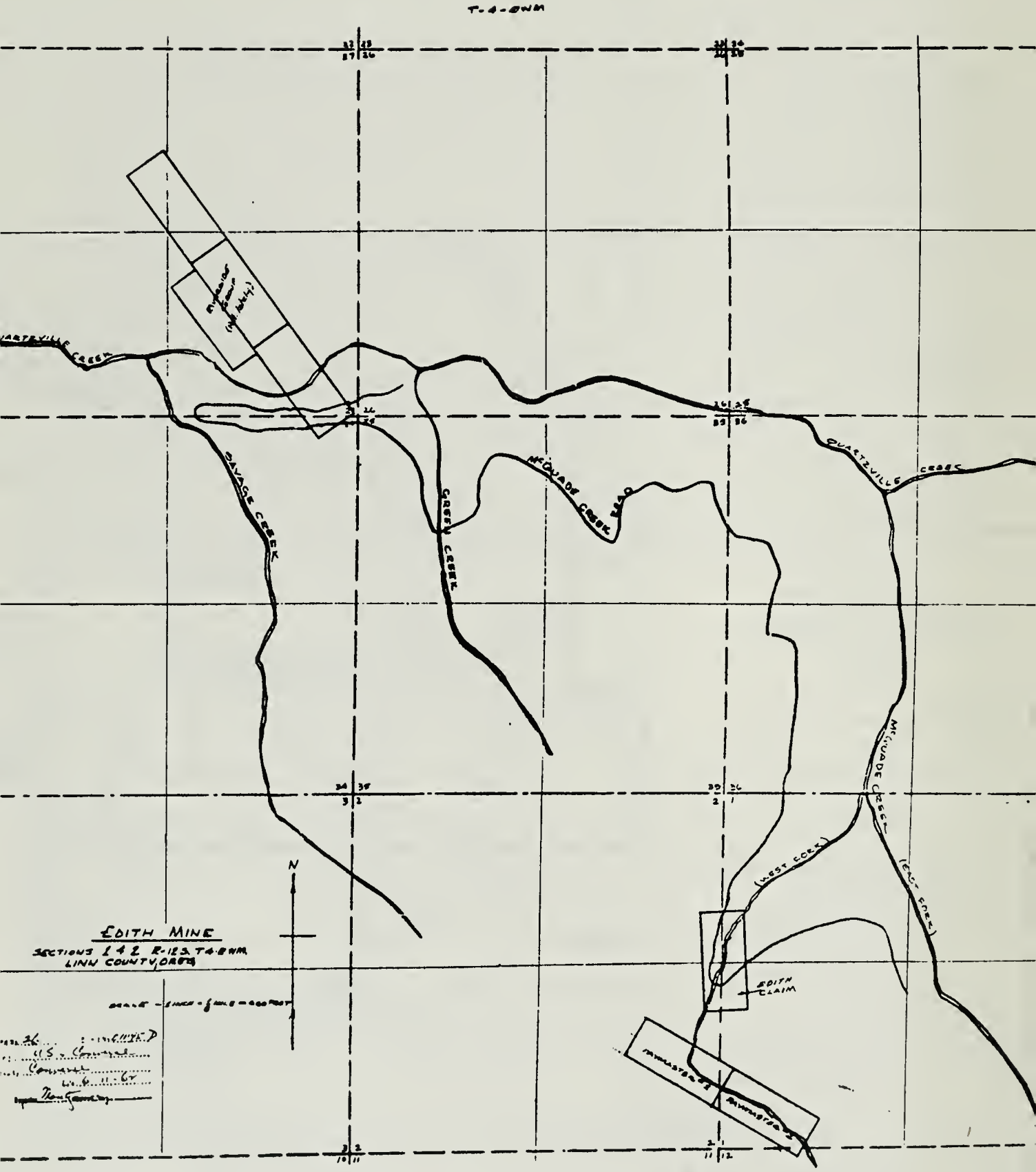
- Supervisor's Headquarters
- District Ranger Station
- Guard Station

(Report Fires Here)

- Triangulation Station
- Permanent Lookout Station
- Triangulation Station and Permanent Lookout Station
- Emergency Lookout
- House Cabin or Other Building
- Mine or Quarry
- Airway Light Beacon
- Gaging Station
- Located or Landmark Object
- Improved Recreation Area, For. Ser.
- National Forest Boundary
- Adjacent National Forest Boundary
- Transmission Line
- Railroad
- Trail
- Road, Dirt or Better
- Road, Primitive
- Forest Development Roads
- U. S. Highway
- State Highway
- National Forest Land

Sweet Home 15 Miles

Reprinted from Forest Series

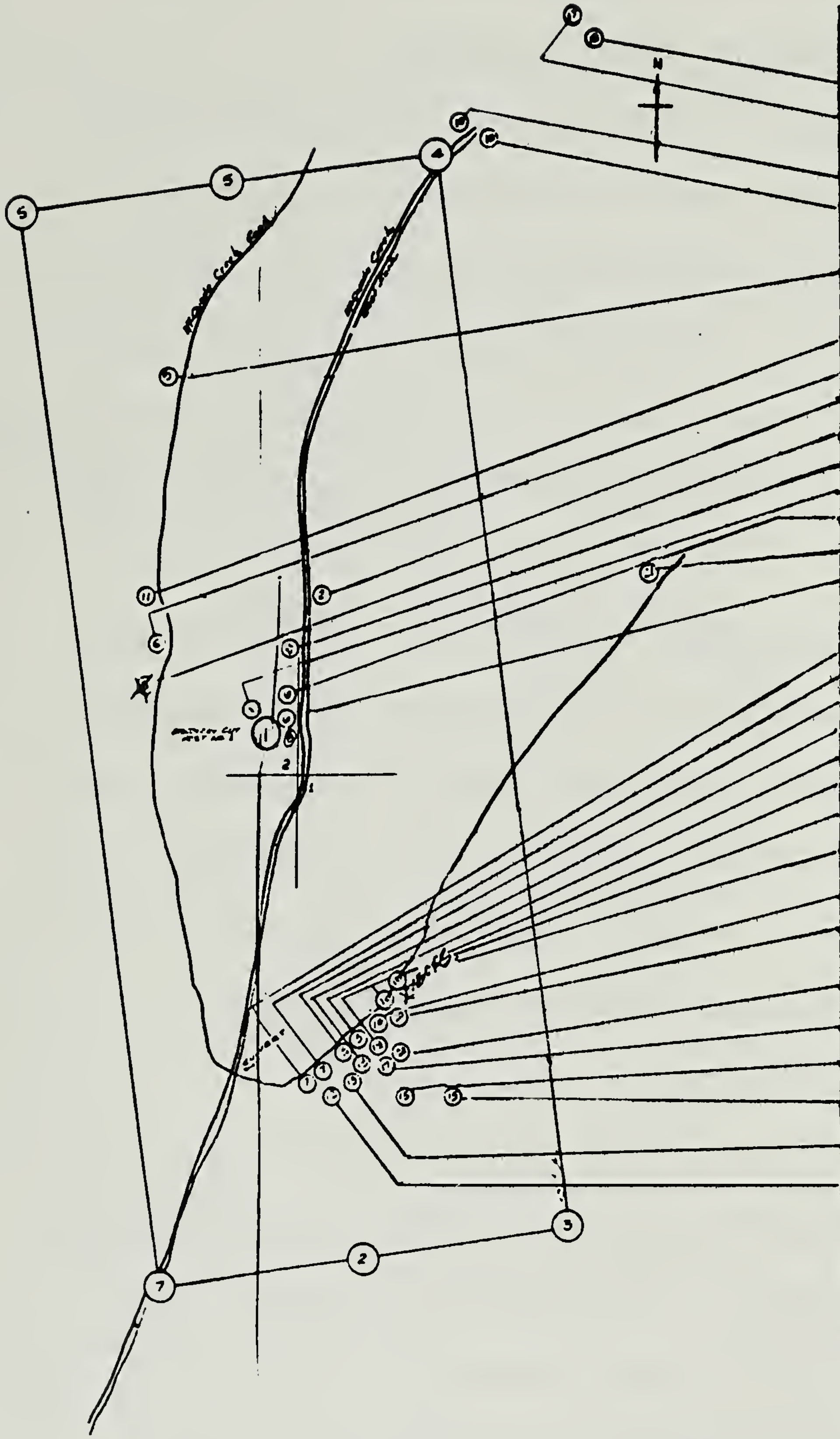

T-4-8WM
SAVAGE CREEK
GREEN CREEK
McQUADE CREEK ROAD
QUARTZVILLE CREEK
McQUADE CREEK
(WEST FORK)
(EAST FORK)
EDITH CLAIM
N
EDITH MINE
SECTIONS 1 & 2 R-1E.2 T-8 S.W.M.
LINN COUNTY, OREG.

to the Risley claims to the North. See scale on Exhibit C, R 152, before enlargement. The fracturing is over a wide area Tr 74.

The fracturing of the earth's crust makes an underground plumbing system for the mineral solutions to come up from below and form veins. Tr 74. The lodes are fractured fillings of massive and vuggy quartz in which there are sulphides of base metals. Tr 40. One zone of base metal sulphides is on the Edith and Paymaster mine, another on the Riverside claims, and a third on the Risley group. Tr 75, 76. Gold, Silver, Copper, Lead and Zinc minerals were discovered.

Valuable Minerals Discovered: The Examiner found that six samples taken by the mining claimant from or near the discovery cut in the North half of the Edith claim were taken from the mineral parts of the vein at the places indicated on Exhibit 28, and average $36.42 per ton. Tr 23, Ex. 28, Finding No. 7, see page 20, this Brief. And this finding, affirmed by the Secretary, shows average values approximately three times the average values of similar ores mined in this United States. Tr 117, 118.

The Examiner found that four samples taken by the mining claimant and one taken by the Government in the adit on the Paymaster claim averaged $74.20 per ton, Ex. 27, Finding No. 14, see page 23, this Brief. And this finding, affirmed by the Secretary, shows average values approximately five times the average values of similar ores mined in the United Sates. Tr 117, 118.



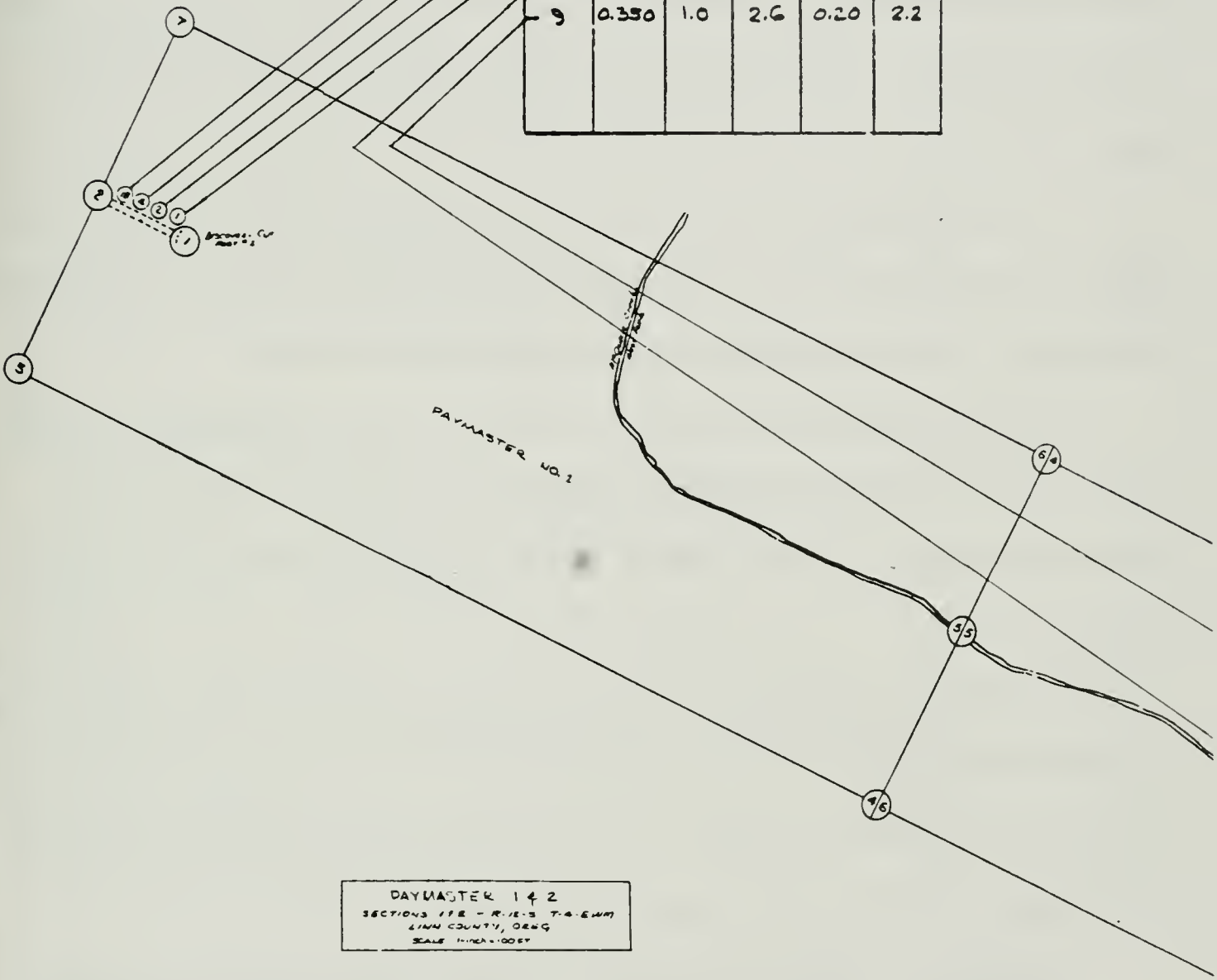
NO.	Au-oz.	Ag-oz.	Pb-%	Cu-%	Zn-%
18	0.490	1.50	6.50	0.50	9.10
17	0.010	6.80	2.74	10.55	16.60
10	0.030	1.3	3.2	0.34	4.7
10	0.005	1.7	0.5	0.06	3.9
5	Tr.	Nil.	0.15	0.04	2.2
11	Tr	Tr	0.20	0.30	1.00
6	0.005	0.5	1.3	0.15	1.5
2	0.100	—	56.78	—	—
8	0.005	0.7	1.0	0.13	1.7
21	Tr	Tr	0.50	0.50	2.10
1	0.120	0.96	0.43	4.15	—
6	0.010	0.3	Nil.	0.10	Nil.
21	NIL	Tr.	Tr	Tr	1.00
6	0.030	0.7	Nil	1.11	2.4
7	0.025	1.9	4.9	1.02	12.9
7	0.185	1.0	5.8	0.41	6.5
3	0.410	2.80	0.40	17.20	21.60
13	0.020	0.90	0.10	8.10	3.17
3	0.360	3.00	0.46	20.40	23.10
19	0.020	6.2	3.3	10.07	17.60
16	0.010	1.1	1.3	0.126	3.7
16	0.015	0.6	1.1	0.037	1.3
14	0.020	6.7	11.7	3.2	17.2
20	0.260	3.70	0.40	21.40	13.80
20	0.030	3.30	1.50	5.28	10.40
17	0.080	2.20	0.35	1.00	4.42
15	0.030	2.60	1.00	0.80	6.25
15	0.020	2.70	0.70	0.70	4.10
13	0.010	1.20	0.30	4.18	6.76
12	0.035	7.40	3.30	23.03	21.63

EDITH MINE

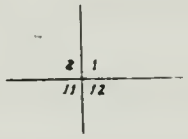
SECTIONS 1 & 2 — R.1E.S T.4.S.W.M
LINN COUNTY, OREG.
SCALE: 1 inch = 100 Ft.

28
U S v Converse
6-11-62

No.	Au-oz.	Ag-oz	Pb-%	Cu-%	Zn-%
18	0.49	1.30	0.30	0.50	9.10
4	0.16	3.00	0.40	1660	12.30
2	0.070	2.9	25.9	—	—
1	—	—	61.2	0.35	—
3	0.040	1.2	2.1	0.25	2.4
9	0.350	1.0	2.6	0.20	2.2



DAYMASTER 1 & 2
SECTIONS 11 E - R.1E-3 T.4-E.W.M
LINN COUNTY, OREG
SCALE 1-INCH-1000 FT



Other samples were taken but were not included in the averages computed above since they were exceptionally high in grade. These include exhibits 33 and 34 and a 50 pound sample sent to the Selby smelter.

It was stipulated as to exhibit 33: Mr. Smith took the sample 50 feet from the road cut along the lode line in the southern part of the Edith claim. It weighed 15 pounds. It contains sulphide and 7% to 10% lead and 10% to 15% zinc. Tr 184-187.

It was stipulated as to exhibit 34: Mr. Converse took the sample in the tunnel on the Paymaster claim. It weighed three pounds. It contained 60% lead and 20% zinc. It assayed $192 per ton. Tr 201, 202, 221, 222.

A large sample of 50 pounds was shipped to the Selby smelter, Tr 78. It was a sample taken from the Edith claim, Ex. 14, Ex. 28. The smelter's assay showed gold 0.02 oz., silver 6.7 oz., lead 11.7%, copper 3.2%. Ex.14, Tr 78.

The Minerals Officer and mining engineer for the Government, Mr. Suchy, took additional samples. When asked to produce the assay certificates, he said the attorney for Forestry had them. The attorney refused to produce the assays on the ground that they were his work record. Tr 62.

Contestant's exhibits A-J were received in evidence in the Government's case in chief. Mining claimant's exhibits, assay certificates 1-21 and map showin the relation of the Edith and Paymaster claims to the Riverside group, exhibit 26, and map of the Edith claim showing assays, exhibit 28, and map of the Paymaster claim showing assays, exhibit 27, and map showing principal mineral deposits in

the State of Oregon, exhibit 29, and exhibits 22, 23, 24 showing professional backgrounds of mining claimant's geologists and the report of Dr. W. G. Johnson, exhibit 25, were all received during the Government's case in chief.

EXHIBITS	FOR IDENTIFICATION	ADMITTED
Contestant's :		
A Map of Edith Lode Claim	10	30
B Timber values in both claims	33	33
C Map of general area (Cascadia Ranger District Map)	36	37
D Map showing Edith & Paymaster claims	37	52
E Map of workings	38	52
F Photograph showing workings	42	52
G Assay certificate, August 1960	43	52
H Assay certificate, May 1962	45	52
I Assay certificate, October 1960	52	52
J Mr. Holmgren's sketch map of Paymaster tunnel	106	116
Mining Claimant's :		
1-21 Assay certificates	7	8
22 Professional background, Dr. W. G. Johnston	7	8
23 Professional background, Dr. Albert J. Walcott	7	8
24 Professional background, Russell A. Paige	7	8
25 Report, Dr. W. G. Johnston	7	8
26 " " " (signed copy)	17	93
27 Map, Paymaster	17	30
28 Map, Edith claim	19	30
29 State of Oregon map showing principal mineral deposits	102	103
30 Three rocks	129	Rejected 132
31 Rock sample	157	160
32 Rock sample	168	-
33 Sample from Edith lode line	184	186
34 Sample from Paymaster lode	201	222

National Average for Ores Mined : The average value of lead and zinc ores mined in the United States is $12 to $14 per ton, Tr 117. The average for copper ores mined in the United States is $6 per ton, Tr 118.

Exploration and Development Overlap: The mineral officer and mining engineer for the Government, Mr. Suchy, explained that it was quite obvious

that exploration work and development work overlap and describe the same kind of work. Driving a shaft in country rock may be either exploration or development work, Tr 89. A crosscut, whether in ore or not, may be described as development or as exploration work, Tr 90. Diamond drilling, tr 89, drifting, Tr 89, bulldozing, Tr 85, may be either development or exploratory work.

Further Work Justified: Mr. Suchy testified that if the claims were his, he would, as a prudent man, spend money on the claims. He would do bulldozing and then some drifting on the vein. If the trenching was in ore, it would be development work. It would be justifiable to spend more money on the property in an effort to determine the extent of the ore body. He advised Mr. Converse to spend his money and time on the claims. Tr 100, 101.

Mining Claimant's Witnesses: [1].

Dr. William G. Johnston, geologist, M.I.T., wrote a report on the mine which shows that a reasonably prudent man would be justified in spending effort and money on the claims to make a mine. Exhibit 25,

Dr. Albert J. Walcott, geologist, testified that there was sufficient mineralized showing on the Edith claim to justify a reasonably prudent person

---

1./ Contestee's Witnesses:

	Direct	Cross	Redirect	Recross
Carl N. McInnis	122	133		
Floyd Persons	138	160		
Edward A. Leonard	162	172		
Albert J. Walcott	173	175		
Russell A. Paige	177	179	180	
Richard A. Smith	182	188	189	
Damon L. Leonard	191			
Ford M. Converse	200	209	212,219	216

in spending time and money in an effort to develop a paying mine. Tr 174.

Russell A. Paige, M.Sc. in geology, formerly with the United States Geologic Survey, who has published a number of technical publications, testified that he would recommend spending time and money on the Edith claim, and that a reasonably prudent person would be justified in doing so. Tr 178, 179.

Edward A. Leonard, geologist and mining man, gave his opinion that there was sufficient mineral on the Edith and the Paymaster claims to warrant a reasonably prudent man in spending time and money to develop a paying mine, and that he would recommend doing so. Tr 171.

Carl N. McInnis, U. S. Department of Agriculture employee, testified that he was experienced in mining and gave his opinion that a reasonably prudent man would be justified in spending time and money to develop the Edith and Paymaster claims. Tr 133.

Richard A. Smith, a prospector with over 30 years experience, testified that a prudent man should sure spend more money in that kind of a locality to develop a mine. Tr 188.

Contestant's Rebuttal:

Mr. Suchy testified that smelter charges would probably run between 25 and 25% of the metal price value; lead will run somewhat higher, around 50% to maybe 60% in some cases, of the metal price value. Tr 222.

REQUESTED FINDINGS

The Hearing Examiner adopted certain findings of fact requested and denied others. The Secretary adopted the findings as made by the Examiner.

The requested findings and rulings thereon are as follows :

Requested Finding No. 1. The Edith and Paymaster claims were located originally by the father of Mr. Converse over fifty years ago. In 1910, the only access to the claims was by a trail which led thirty miles to the nearest road. (Tr. 16). Mr. Converse relocated the claims in 1951 (Tr 15). Access roads were built into the area in the Fifties (Tr 17). Ruling on No. 1: The first two sentences are adopted. The third sentence is amended to read: "Access roads were built into the area in 1959 and 1960."

Requested Finding No. 2. When the area in which the claims are situated was surveyed, it was determined by the Land Office of the United States that sections 1 and 2 in the area were mineral lands, and they were so classified. (Tr 208). Ruling on No. 2: Is amended to read: The land on which the claims are located is mineral in character.

Requested Finding No. 3. Three sulfide zones (found by Mr. Suchy) are one on the Edith and Paymaster claims, another on the Riverside claims,[1] and a third on the Risley group, which are on the same major structure. The sulfide zones have never been investigated to any extent, and it is yet to be determined whether they are productive in large quantities or in small quantities of commercial ore. The fact that these sulfide zones do exist is one of the favorable criteria for the development of these properties.(Tr 75,76, testimony of Mr. Suchy. Ex 26). Ruling on No. 3: The first sentence except for the

---

1/ Riverside Claims were clearlisted for patent by Mr.Suchy (Tr. 75).

last clause "which are on the same major structure" is adopted. There was no evidence to support this claim. The second and third sentences are adopted.

Requested Finding No. 4. The vein on the Edith Claim is such that an experienced prospector could follow it the length of the claim and determine that there was a lode of mineral-bearing rock along the lode line by observing the oxidization on the surface and digging into the rock in place (Tr 184), and by using an electronic instrument to measure the absence of radioactivity. Lead is not as radioactive as the country rock (Tr 189, 190). Ruling on No 4: The first sentence is denied. The great weight of the evidence was that the veins on the Edith had a strike of approximately N. 45° W and could not be along the lode line. The second sentence is adopted.

Requested Finding No. 5. Prior to July 23, 1955, in 1950, a cut, required by Oregon law, was dug near a hemlock tree near the middle of the Edith claim near post No. 1 (Tr 11). Samples were taken with an axe from a lode or ledge of mineralized rock exposed in the cut from the rock face (Tr 25). When assayed on September 10, 1950, the samples ran 61.2 per cent lead and .35 per cent copper, showing a value of $30.86 per ton. (Exhibits 1 and 28). Ruling on No. 5: The first sentence is adopted. The second sentence is denied. It is not supported by consistent testimony. The third sentence is inaccurately stated. There are two samples shown on the assay certificate (Exhibit 1) dated September 10, 1950. The first had 61.2% lead and .35% copper. The per ton value of this sample at the prices of lead and copper given at the hearing is in excess of $150. The second sample contains .12 oz. gold,

.96 oz. silver, .43% lead and 4.15% copper. The value shown on the certificate for the second sample is $31.86. Whether these samples came from boulder the face of a cliff or the discovery pit is not clear from the testimony.

Requested Finding No. 6. That the cut near themiddle of the Edith claim is marked No. 1 on Exhibit 28, and red circles on this map represent ore samples taken from the Edith claim. Numbers in the red circles and in the table of assays correspond to the assay certificates numbered as Exhibits 1 through 21 (Tr 18).

Ruling on No. 6: is adopted. Many of the assay certificates contain more than one sample and the exhibit number on the plat does not distinguish between samples.

Requested Finding No. 7. The samples taken from, or near, the cut near the center of the Edith claim were chip samples from the mineral parts of the veins and were taken by the Mining Claimant, or at his direction, at the places indicated by red circles on Exhibit 28. (Tr 23). They assayed as follows:

Sample No.	Au. oz.	Ag.oz.	Pb.%	Zn%	Cu%	Value per ton
1.	0.12	0.96	0.43	nil	4.15	$ 30.86
2.	0.10	nil	56.78	nil	nil	115.50
6.	0.005	0.5	1.3	1.5	0.15	7.64
6.	0.03	0.7	nil	2.4	1.11	13.12
8.	0.005	0.7	1.0	1.7	0.13	8.30
21.	Tr	Tr	0.50	2.10	0.50	8.60

Ruling on No. 7: Is adopted with the following exception: The samples were both chip and grab samples and the 4th sample labeled 6 was from a site west

of the road not near the discovery cut. A computation of value for the 2nd sample with lead at 12.36 cents/a pound will result in a value of over $150 per ton.

Requested Finding No. 8. The cut described above was covered over by the debris left by the Forest Service in building an access road through the Edith claim. When Mr. Suchy was there, the talus of this debris had sloughed into the cut (Tr 204). Although the Claimant had cleaned out the cut three or four times Tr 210, the debris put into the cut by the Forest Service filled it up again and made an inspection of the cut dangerous. (Tr 205, 210). Ruling on No. 8: Is adopted.

Requested Finding No. 9. Prior to July 23, 1955, in 1951, an outcrop was discovered in the southerly part of the Edith claim. Work was done on the outcrop before the access road was constructed, and fresh rock at this point exposed the same vein also seen in the cut to the north near the middle of the claim. (Tr 192-194). Ore occurred in parallel veins; the largest was 28" in width. (Tr 196). Ruling on No. 9: Is denied. This finding is not supported by the evidence.

Requested Finding No. 10. Samples taken by Milroy Suchy, Contestant's engineer, from the fracture zone structure on the Edith claim exposed in the area of the outcrop mentioned above, south of the McQuade Creek, were assayed as follows: (Tr 53-56, Exhibit G)

Tr p.	Sample No.	Au.oz.	Ag. oz.	Pb.%	Zn.%	Cu.%	Value per ton
53, Ex G	FC 2	0.01	2.8	8	16	1.55	$ 64.97
55 Ex G	FC 3	nil	nil	0.3	2.8	0.25	8.32
55 Ex G	FC 4	nil	0.6	2.4	3.2	0.15	13.76
54 Ex G	FC 5	0.01	1.6	4.	10.4	0.65	37.37

Ruling on No. 10: Is denied. This finding is not material to the issue.

Requested Finding No. 11. Samples in the same area mentioned in requested findings 9 and 10 above were taken by the Mining Claimant, or at his direction, and were assayed with the following results: Exhibit 28

Sample No.	Au.oz.	Ag.oz.	Cu.%	Zn.%	Pb.%	Value per ton
3	0.36	3.00	0.46	23.10	20.40	$ 122.68
3	0.41	2.8	0.4	21.60	17.29	112.64
7	0.025	1.9	4.9	12.9	1.02	44.87
7	0.185	1.0	5.8	6.5	0.41	37.90
12	0.035	7.40	3.30	21.63	23.03	139.15
13	0.010	1.20	0.30	6.67	4.18	44.69
13	0.020	0.90	0.10	8.10	3.17	56.86
14	0.020	6.7	1.17	17.2	3.2	89.77
15	0.030	2.6	1.50	0.8	6.25	24.65
15	0.020	2.1	0.7	4.1	0.7	18.10
16	0.010	1.1	1.3	3.7	0.126	10.90
16	0.015	0.6	1.1	1.3	0.037	10.02
17	0.080	2.20	0.35	4.42	1.00	20.60
19	0.020	6.2	3.3	17.60	10.07	97.70
20	0.260	3.70	0.40	13.80	21.40	167.98
20	0.030	3.70	1.50	10.40	5.28	61.43

Ruling on No. 11: Is denied. This finding is not material to the issue.

Requested Finding No. 12. Mr. Smith, a prospector, took a 15 lb. piece of rock (Ex.33) 40 feet above the place where the road crosses the Edith claim. The rock was exposed as an outcrop and was not exposed by road work. Tr 186. It was stipulated that the rock, Ex. 33, weighs about 15 pounds and is about 20% sulfides consisting of 7 to 10% lead and from 10 to 15% zinc. Ruling on No. 12: Is adopted.

Requested finding No. 13. That on the Edith claim there is a vein or lode of quartz or rock in place. The quartz or other rock in place carries gold, silver, copper, lead and zinc. That the occurence is such as to warrant a prudent man in the expenditure of his time and money in the effort to develop a valuable mine.[2]. Ruling on No. 13: Is denied for the reasons set forth in the decision.

PAYMASTER CLAIM

Requested Finding No. 14. Sample No. FC-10 was taken in the adit on the Paymaster claim by Mr. Holmgren (Tr 108, Exhibit J). Samples Nos. 1, 2, 4 and 18 were taken by the Mining Claimant, or under his direction, in the same adit, as is shown by Exhibit 27. Numbers circled in red on the map, Exhibit 27, show the places where the samples were taken. The samples were assayed with results as follows:

2./ See testimony of: Suchy, Tr 84-90, Forest Service mining engineer; McInnis, U.S. Department of Agriculture employee, Tr 133; Edward A. Leonard, geologist, Tr 171; Dr. Walcott, geologist, Tr 174; Russell A. Paige, geologist, Tr 178; Richard A. Smith, prospector Tr 188; Dr. W. G. Johnston, geologist Ex 25.

Tr p.	Exhibit	Sample No.	Au.oz.	Ag. oz.	Pb%	Zn%	Cu%	Value per ton
108	EXJ	FC-10	0.38	1.3	2.6	5.0	0.20	$ 29.57
	EX 27	1	nil	nil	61.2	nil	0.35	167.88
	Ex 27	2	0.07	2.9	25.9	nil	nil	61.72
140	Ex 27	4	0.16	3.00	0.40	12.50	16.60	71.51
	Ex 27	18	0.49	1.50	0.50	9.10	0.50	40.35

Ruling on No. 14: Is adopted subject to correction of sample No. 4. In this sample the percentages of copper and lead have been inverted.

Requested Finding No. 15. About 50 years ago, Mr. Converse took from the Paymaster adit, Exhibit 34, and basedupon stipulation it was agreed that this sample weighs approximately three pounds and contains 60% lead and 20% zinc. (Tr 221, 222). Ruling on No. 15: Is adopted.

Requested Finding No. 16. Prior to July 23, 1955, in 1950, Mr. Converse made a discovery on the Paymaster claim near the portal of the adit and Post No. 1. A sample marked 1 in a red circle on Exhibit 27 was assayed September 10, 1950, and shows lead and copper of the value of $28.80 per ton(Exhibits 1 and 27). Ruling on No. 16: Is denied for the reasons set forth in the decision.

Requested Finding No. 17. On the Paymaster claim there is a vein or lode of quartz or rock in place which carries gold, silver, copper, lead and zinc. The occurrence is such as to warrant a prudentman in the expenditure of his time and money in the effort to develop a valuable mine.[3.]

3/ See testimony of Carl McInnis, Tr. 133; Ed Leonard, geologist, Tr 171, 172; Richard Smith, miner, Tr 187, 188.

Ruling on No. 17: Is denied for the reasons set forth in the decision.

SPECIFICATIONS OF ERROR

We will prove ourcase by showing that the District Court erred as a matter of law in allowing the Secretary's motion for summary judgment and affirming the administrative decision.

1) Since the Surface Resources Act makes mandatory, under §613 (c) that a complaint be filed stating the facts constituting the grounds of contest, the court below erred in holding that no complaint was necessary. R 44.

2) Since the court below found that a copy of the published notice had not been served on the mining claimant, R 43, as required by §613 (a), the court erred by failing to hold that the publication was a nullity under §613 (e) and to reverse the Secretary for his fai lure to exercise administrative power in accordance with the statute upon which that power depends.

3) Since the court below found that no certificate of title accompanied the statutory request initiating the proceeding under §613 (a), R 43, it erred in failing to hold the proceeding a nullity and to reverse the Secretary for noncompliance with the statute upon which his power depends.

4) Since the undisputed facts show the discovery of lodes in claims mineral in character containing ores of higher values than similar ores mined in the United States, it was error for the District Court to hold that the evidence failed to establish a mineral discovery under the mining law.

5) Since the Secretary upheld the Examiner's denial of mining claimant's right to make offers of proof for the record on appeal , the court below erred in upholding the decision of the Secretary.

6) Since the mining claimant's requested findings 9, 10, 11, 13, 16 and 17 were material to the issues and were supported by substantial evidence undenied, the court below erred in failing to correct the administrative decision as to each such requested finding.

7) Since it appears from the Notice of Hearing of February 14, 1962, that the charge of want of discovery was asserted by the Hearing Examiner over his signature at the direction of Forestry, the prosecuting agency, the court below erred by failing to hold that mining claimant's motion for change of hearing examiner should have been allowed under the Administrative Procedure Act. 5 USC §1004 (c).

SUMMARY OF THE ARGUMENT

The District Court erred as a matter of law in allowing the Secretary's motion for summary judgment and affirming the administrative decision.

The first three specifications of error concern the exercise of agency power where the agency has failed to comply with the conditions of the statute which created that power. We are concerned with agency non-compliance with the conditions upon which agency jurisdiction over the subject matter is made to depend. The Court below concluded that agency non-compliance with statutory conditions was not necessary. It found that no complaint had been filed, no service of published notice had been made, and that no certificate of title accompanied the statutory request initiating the proceedings.

The fourth specification concerns the application of the law of

mineral discovery to the established facts. The fifth concerns administrative refusal to allow offers of proof to be made for the record on appeal. The sixth specification concerns refusal to find facts material to the issue which were supported by uncontroverted evidence. The seventh asserts that the mining claimant's motion for change of hearing examiner should have been allowed.

1. The court below found that no complaint was filed and concluded that none was necessary. The Surface Resources Act, 30 USC 612, amends the mining law. It makes mining claims subject to the rights of the government, its permittees and agencies to use the surface of mining claims, and §613 (a), sets out in detail, the procedure designed to make §612 retroactive in its application to mining claims located prior to July 23, 1955 effective date of the Act.

§613 (a) grants power to Forestry to initiate a proceeding to determine title to mining claims. §613 (c) grants power to Interior to hear and decide such controversies and requires that Interior shall follow its established practice with regard to contests or protests. The established practice requires the filing of a complaint setting forth a statement in clear and concise lanquage of the facts constituting the grounds of contest. 43 C.F.R. 221.54.

The notice published under §613 (a) is not a complaint because it does not state facts constituting the grounds of contest. It requires the mining claimant to state the date, book and page where recorded, legal

description of his claim, and whether he is a locator or a purchaser. R 241.

The Administrative Procedure Act makes mandatory that no process shall be enforced in any manner except as authorized by law. 5 USCA 1005 (b), 1008 (a). Agency power must be invoked in the manner provided by statute. Unless agency power is exercised strictly according to the procedures fixed by the statute granting the power, the action is a nullity.

2. The court below found that a copy of the published notice had not been served on the mining claimant as required by §613 (a). The court erred by failing to hold that such publication was a nullity under §613 (e), which provides that failure to serve a copy of the publication renders the proceeding wholly ineffectual. Such failure was agency non-compliance with a mandatory statute.

3. The court below found that no certificate of title accompanied the statutory request initiating the proceeding under §613 (a). The court erred by failing to hold that the proceeding was a nullity and to reverse the Secretary for non-compliance with the statute upon which his power depends.

A certificate that there are "no tract indexes", R 238, is no substitute for a "certificate of title" prescribed by §613 (a).

It is impossible to reconcile the certificate of Mr. Clark that <u>there are no tract indexes</u> with the affidavit of Ralph L. Warstell, R 240, that he mailed a notice to each of the mining claimants whose name and address

is set forth in the certificate of examination of tract indexes relating to lands described in the published notice.

The legislative history shows that Congress intended to set up technical procedural safeguards to protect bona fide mining claimants against harrassment by administrative agencies. U.S. Code, Cong. and Adm. News, 84th Congress 1st Session, 1955, Vol. 2, p. 2479.

4. The undisputed facts show the discovery of lodes, in claims mineral in character, containing ores of higher value than similar ores mined in the nation. Applying the proper legal standard of discovery under the mining law to the established facts, the administrative decision should have been reversed.

a. Lodes were discovered containing massive sulphides of base metals on claims in a sulphide zone.

b. The Government's witnesses established that:

i. The average value of the ores discovered in the lodes on the claims exceeds the average value of the same ores mined in the United States.

ii. The average value of lead and zinc ores mined in the United States is $12 to $14 per ton (Tr 117), and the average for copper ores mined in the United States is $6 per ton (Tr 118).

iii. The Government's samples of the lode on the Edith claim average $31.10 per ton. (Exhibit 28) R 20

iv. The Mining Claimant's 22 samples of the lode on the Edith claim average $56.64 per ton. (Exhibit 28) R 20

v. The Governments sample of the ore in the lode on the Paymaster claim was $29.50 per ton. (Exhibit 27) R 20

vi. The Mining Claimant's samples of the ore in the lode on the Paymaster claim averaged $122.25 per ton. (Exhibit 27) R 20

vii. Mr. Suchy, Mining Engineer for the Government, advised Mr. Converse to spend time and money doing further bulldozing and drifting on the vein. Mr. Converse' reliance on his advice is justified.

viii. Mr. Suchy, as a prudent man, said if the claims were his, he would do bulldozing and drifting on the vein. It would be justifiable to spend more money on the property in an effort to determine the extent of the ore body. Tr 100, 101.

c. Exploration and development work mean the same thing insofar as they relate to the effort to make a mine out of a particular ore deposit that has been discovered. Discovery does not depend upon the name given to the kind of work a prudent man would be justified in performing on a mining claim. Charlton v. Kelly, 156 F 433, 436 (9th Cir. 1907).

d. The rule for evaluating mineral discovery is the "prudent man rule" from Castle v. Womble, 19 L.D. 455. A mining claimant is not required to show that he has encountered a deposit which would be commercially profitable immediately. A valuable mine need not be a profitable one so long as the mineral encountered is of prospective value. We are concerned here with a major structure, a lode of major proportions and not with stringers, pods, veinlets or lenses. The court below erred in failing to correct the wrong conclusion that the administrative decision drew from the undisputed evidence relating to discovery.

5. The court below erred by upholding the administrative denial of mining claimant's right to make offers of proof for the record on appeal.

Denial of the right to state into the record for the scrutiny of the appellate court what evidence a party would expect to prove by the excluded testimony is tantamount to denial of a trial and is a denial of "Due Process".

6. The mining claimant's requested findings nos. 9, 10, 11, 13, 16 and 17 were material to the issues and were supported by substantial evidence undenied. The court below erred in failing to correct the administrative decision as to each such requested finding.

Findings 10 and 11 related to samples taken on the south half of the Edith claim, which were erroneously rejected and not considered. Since the lode had been discovered prior to the effective date of the Surface Resources Act, the Government's samples and the mining claimant's samples of the same lode in the south half of the claim should have been considered as evidence establishing the value of the minerals in the discovered lode. These samples taken after 1955 did not evidence a new discovery and should not have been rejected on that pretext.

Evidence offered by the Government in its case in chief established the facts which should have been found as requested in each of the requested findings.

7. The charge of want of discovery was asserted by the Hearing Examiner over his signature at the direction of Forestry, the prosecuting agency. The court below erred by failing to hold that the mining claimant's motion for change of hearing examiner should have been allowed under the

Administrative Procedure Act. A hearing examiner is disqualified from hearing a case if he acts at the direction of an agency engaged in the performance of investigating or prosecuting functions. Forestry was so engaged and the examiner acted at the direction of the agency. 5 USC 1004 (c).

ARGUMENT

THE DISTRICT COURT ERRED AS A MATTER OF LAW IN ALLOWING THE SECRETARY'S MOTION FOR SUMMARY JUDGMENT AND AFFIRMING THE ADMINISTRATIVE DECISION.

The Surface Resources Act, Public Law 167, was enacted July 23, 1955, 69 Stat. 368, 30 USC 612, 613, (Supp. 1965).

Section 612 makes unpatented mining claims located after July 23, 1955 subject to the Government's right to manage surface resources and to manage and dispose of vegetative resources, except mineral deposits subject to location under the mineral laws of the United States. And, it makes the claims subject to the right of the United States, its permitees and agencies, to use so much of the surface thereof for such purposes or for access to adjacent lands.

Section 613 (a) sets out a detailed procedure designed to make §612 retroactive in its application to mining claims located prior to July 23, 1955, as to claims alleged to be invalid. The head of any agency responsible for administering lands of the United States may initiate a proceeding for determination of the surface rights of lands he is charged with administering.

§613 (c) provides that after the prosecuting agency has complied with the provisions of section (a), the Secretary of the Interior shall have power to hear the case and make a determination of the facts in accordance with the procedures then established by the Department of the Interior in respect to contests or protests affecting public lands of the United States.

There is no presumption of lawful exercise of authority enjoyed by administrative agencies. Jurisdiction of the subject matter by administrative agencies must be pleaded and proved, Phillips v. Fidalgo Island Packing Co., 230 F 2d 638, 16 Alaska 12, Rehearing denied 238 F 2d 234, 16 Alaska 338, Cert. den. 77 S Ct. 262, 352 U.S. 944, 1 L ed 2d 237, 16 Alaska 561.

The powers of inferior courts and administrative agencies created by Congress are confined to those bestowed by Congress. Marquette Cement Mfg. Co. v. Federal Trade Commission, 147 F 2d 589, (CCA 7 1945.) Expertise possessed by an administrative agency does not empower the agency to rewrite the laws which it has been charged with enforcing. Atlanta Trading Corp. v. Federal Trade Commission, 258 F 2d 365 (CA 2 1958). And Administrative powers cannot be created by the courts in the proper exercise of their judicial functions. Federal Trade Commission v. Raladam Co., 283 U.S. 643, 51 S. Ct. 587.

We are concerned here with the exercise of agency power in accordance with the conditions of the statutes which created that power. We are not concerned with jurisdiction over the person but with agency non-compliance with the conditions upon agency jurisdiction over the subject matter

is made to depend.

I

SINCE THE SURFACE RESOURCES ACT MAKES MANDATORY, UNDER §613(c) THAT A COMPLAINT BE FILED STATING THE FACTS CONSTITUTING THE GROUNDS OF CONTEST, THE COURT BELOW ERRED IN HOLDING THAT NO COMPLAINT WAS NECESSARY.

The power of the Secretary of the Interior to hear cases and determine them under §613 (c) is made to depend upon the Secretary's compliance with the provisions of the statute which creates that power. Section 613 (c) requires that: "The procedures with respect to notice of such a hearing and the conduct thereof...shall follow the then established general procedures and rules of practice of the Department of the Interior in respect to contests or protests affecting public lands of the United States".

The legislative history makes clear that the Department of the Interior is required to follow established procedures with respect to contests or protests affecting public lands. Report No. 730 of the House Committee on Interior and Insular Affairs, emphasizes this point as follows:

> "Such hearing would, under the bill, follow the established procedures and rules of practice of the Department of the Interior with respect to contests or protests affecting public lands." U.S. Code, Cong. and Admin. News, 84th Congress, 1st Session 1955, Vol. 2, p. 2485. (Emphasis supplied)

The established rules of the Department of the Interior require that an initiation of a contest must be by complaint. (Part 221) 43 CFR 221.63. The Complaint shall contain "a statement in clear and concise language of the facts constituting the grounds of contest". 43 CFR 221.54. By the

use of the word "shall", the act makes mandatory that the then established rules of procedure of the Department as to contest proceedings be followed in cases brought under the act.

Section 221.63 - Initiation of Contest. This regulation requires that initiation of a contest must be by a complaint, which must be filed in the Land Office, or if none, in the office of the Director, Bureau of Land Management, Washington, D. C.

Section 221.54 - Contents of Complaint. This regulation requires that the complaint shall contain certain information and shall be under oath. It requires "a statement in clear and concise language of the facts constituting the grounds of contest". (emphasis supplied)

Section 221.68 - Proceedings in Government Contests. This regulation requires that "The proceedings in Government contests shall be governed by the rules relating to proceedings in private contests.

The notice published under §613 (a) cannot function as a complaint since it does not contain "a statement in clear and concise language of the facts constituting the grounds of contest". (emphasis supplied). The publication did nothing more than to request mining claimants to file the following information: 1. the date of their mining locations, 2. book and page where notice is recorded, 3. sections in which claims are situated, 4. whether claimant is locator or purchaser, 5. name and address of claimant and persons having interest in the claim. R 241.

The Department's practice of long standing requires a complaint to be filed in a protest or a contest proceeding. Five cases in the record illustrate this established practice. In United States of America, Contestant v. Eleanor A. Gray et al, Contestees, (1960) contests nos. 0-239 to 0-255 inclusive, mineral applications nos. 03034 to 03050 inclusive, it can be seen that the proceedings were initiated by complaints setting forth the grounds of contest. R 225. In U. S. of Am. Contestant v. Caldwell et al, Contestees, Contest No. 146 Oregon (1958) a complaint was served upon the contestees setting forthe the grounds of contest. R 216. Likewise, charges were made by complaint setting forth the grounds of contest in U.S. of Am. Contestant, v. Edwards, Contestee (1957), Contest No. 166 Oregon, R 209, U. S. of Am. Contestant v. Santiam Copper Mines, Inc., Contestee, (1957) Contest No. 171 Oregon, mineral application No. 02928. R 202. U.S. Contestant v. Woodard, Contestee (1957) Oregon contests 172 and 173, patent applications 03092 and 03093. R 195.

We have found no case involving protests and contests where a complaint has not been filed. There should be no departure from the established practice in cases under the Surface Resources Act for Congress has said the procedures before the Interior shall be the same.

The Administrative Procedure Act, makes mandatory that no process shall be enforced in any manner or for any purpose except as authorized by law. The act provides: "No process, requirement of a report, inspection

or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law". 5 USCA §1005 (b). And 1008 (a) of the act provides: "No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law". (emphasis supplied)

The Administrative Procedure Act must be read as a part of every Congressional delegation of authority, unless specifically excepted. Hotch v. U. S. 212 F 2d 280. And in Wong Yang Sung v. McGrath, 339 US 33, 94 L ed 616, 70 S. Ct. 445, it was held that proceedings to which the act applies must conform to the procedural safeguards enacted by the act if resulting orders are to have validity.

An Administrative Agency is a tribunal of limited jurisdiction which may exercise only the powers granted by statute reposing power in it. Pentheny Limited v. Government of Virgin Islands, 360 F 2 786 (CA Vir.Islands) 1966. And when Congress passes an act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. Stark v. Wickard, 64 S. Ct. 559, 321 US 288, 88 L ed 733 (US App. D. C. 1944).

The power of an administrative officer is limited to carrying out a law according to its terms. Fidalgo Island Packing Co. v. Phillips, 120 F. Supp 777, Aff. 230 F 2 638, rehearing denied 238 F 2 234, Cert. denied 77 S. Ct. 262, 352 U S 944, 1 L ed 2 237. Hence an attempted investigation

by an agency lacking legal sanction has no better standing than an interloper. McMann v. S. E. C. (CA 2) 87 F 2d 377, 109 ALR 1445, cert den. 301 U.S. 684, 81 L ed 1342, 57 S Ct. 785; Railroad Comm. v. Horesta Natural Gas, 166 SW 2d 117.

Therefore, since sec. 613 (c) makes mandatory that a complaint be filed setting forth the facts constituting the grounds of contest, and the Administrative Procedure Act makes mandatory agency compliance with the procedural requirement of the statute, we respectfully submit that the court below erred in holding that "the use of a complaint is averted by the publication requirements of the statute. R 44.

II

SINCE THE COURT BELOW FOUND THAT A COPY OF THE PUBLISHED NOTICE HAD NOT BEEN SERVED ON THE MINING CLAIMANT, AS REQUIRED BY §613 (a), THE COURT ERRED BY FAILING TO HOLD THAT THE PUBLICATION WAS A NULLITY UNDER §613 (e), AND TO REVERSE THE SECRETARY FOR HIS FAILURE TO EXERCISE ADMINISTRATIVE POWER IN ACCORDANCE WITH THE STATUTE UPON WHICH THAT POWER DEPENDS.

The court below found that "a copy of the publication was not served on the mining claimant as demanded by the state " R 43.

§613 (a) provides that:

> "Within fifteen days after the date of first publication of such notice, the department or agency requesting such publication (1) shall cause a copy of such notice to be personally delivered to or to be mailed by registered mail addressed to each person in possession or engaged in the working of the land whose name and address is shown by an affidavit filed as foresaid, and shall cause a copy of such notice to be mailed by registered mail to each person whose name and address is

> set forth in the title or abstract company's or title abstractor's or attorney's certificate filed as aforesaid, as having an interest in the lands described in said notice under any unpatented mining claim heretofore located, such notice to be directed to such person's address as set forth in such certificate; and (2) shall file in the office where said request for publication was filed and affidavit showing that copies have been so delivered or mailed." (Italics supplied)

§613 (e) provides:

> "If any department or agency requesting publication shall fail to comply with the requirements of subsection (a) of this section as to the personal delivery or mailing of a copy of notice to any person, the publication of such notice shall be deemed wholly ineffectual as to that person." (Italics supplied)

Unless the requirements of §613 (a) are complied with, then the Secretary of the Interior has no authority to conduct any hearing or take any procedure with respect to determining the validity of any mining claim under this Act.

The Act makes mandatory that the prosecuting agency "shall" cause a copy of the publication to be mailed to persons listed in a certificate of title accompanying its statutory letter to the Department of the Interior 30 USC §613 (a).

It would seem clear that Congress intended that failure to comply with this statutory condition would render the attempted publication a nullity. The legislative history is as follows:

> "Subsection (e) of Section 5 provides that the publication of notice shall be wholly ineffectual as to any person entitled to be served with, or to be mailed a copy of the published notice, if the notice is not in fact so served upon or mailed to him." U, S, Code, Cong. and Adm. News. 84th Congress 1st Session, 1955, Vol. 2 p. 2486.

An attempt to exercise power without compliance with the provisions of the Act as to the manner and circumstances of its exercise is a nullity. 5 USC 1008(a). Statutory administrative agencies are governed strictly by the statutes from which they derive their existence. N.L.R.B. v. Atlantic Metallic Casket Co., 205 F 2d 931 (CA 5 1950).

Therefore, having found agency non-compliance with the statute, under which the proceeding was brought, the court erred by failing to hold that such attempted exercise of power was a nullity.

III

SINCE THE COURT BELOW FOUND THAT NO CERTIFICATE OF TITLE ACCOMPANIED THE STATUTORY REQUEST INITIATING THE PROCEEDING UNDER §613(a), IT ERRED IN FAILING TO HOLD THE PROCEEDING A NULLITY AND TO REVERSE THE SECRETARY FOR NON-COMPLIANCE WITH THE STATUTE UPON WHICH HIS POWER DEPENDS.

In its opinion, the court below found another instance where administrative power had not been exercised in the manner commanded by the statute. The court said: "No request for publication was accompanied by the required certificate of title or abstract of title. Here the plaintiffs are technically correct..." R 43

A certificate of title is required to accompany the statutory letter initiating the proceeding. The title certificate of an attorney for the Department is sufficient, if it is based on tract indices of mining claims in the county records. If there are no tract indices, the certificate of title must be prepared by a title or abstract company or title abstractor. 30 USC §613 (a)

The legislative history shows that Congress intended to make a title search mandatory.

> "...a copy of the notice must be mailed by registered mail to each person who is shown by a title search to have an interest in the lands." U.S. Code, Cong. and Admin. News, 84th Cong. 1st Session, 1955, Vol 2, p. 2485. (Emphasis supplied).

A "Certificate of non-existence of tract indexes" R 238 is no substitute for a "certificate of title" under 30 USC §613 (a).

It is impossible to reconcile the certificate of Mr. Clarke that there are no tract indexes R 238 with the affidavit of Ralph L. Warstell R 240 that he mailed a notice to each of the mining claimants "... whose name and address is set forth in the certificate of examination of tract indexes relating to land described in said notice".

Congress undoubtedly had in mind the protection of bona fide claimants when it spelled out in the act the procedures to be followed. On the one hand, it wanted to invalidate fraudulent claims; on the other, it recognized that bona fide claimants would suffer from agency harrassment. The legislative history is recorded as follows:

> "On the other hand, continual interference by Federal agencies in an effort to overcome this difficulty would hamper and discourage the development of our mineral resources, development which has been encouraged and promoted by Federal mining law since shortly after 1800." U.S. Code, Cong. and Admin. News, 84th Congress, 1st Session, 1955, Vol. 2, p. 2479.

An example of such agency interference to discourage the development of natural resources is found in this case. Without any right to do so Forestry went on the claims with a bulldozer and caused boulders and trees to be hurtled down upon a miner who was working in the discovery pit below. Tr. 204, 214. Mr. Leonard Damon testified: "They dumped a tree -- it was six feet across in there -- on some of us and our work, and we had to run like the devil to get out of there." Thereafter, although it was dangerous to do so, he cleaned out the discovery pit two or three times, and each time it was filled up by Forestry, so Mr. Suchy, Mineral Examiner, could not sample the pit. (Tr. 197, 198, 204, 205, 210.) After fleeing for his life and cleaning out the pits, the poor prospector had a heart attack and later testified with difficulty at the trial. Tr. 199. Not a jot of evidence in the record contradicts these facts.

In its effort to protect bona fide mining claimants, Congress must have had in mind the effect of §612(c), which prohibits a miner from severing, removing or using surface resources subject to the management of the United States, and that of §612, which prohibits the Government from "material interference with mining". What to the Secretary is not a material interference can be and often is to a miner a substantial interference, which as a practical matter, often does prevent him from mining.

The intention of Congress is defeated and the statute becomes meaningless if one by one technical safeguards commanded by the manda-

tory "shall" are disregarded. Lifting limitations on administrative power might very well result in its abuse. Agency power enforcing its edicts is not law when it transcends the limits of a lawful authority, even when acting in the name and wielding the force of the government. Hurtado v. California, 110 U.S. 516, (1884).

Therefore, since a certificate of title, showing the names of the mining claimants was a mandatory requirement of the Statute, the department's view that no title certificate was necessary should be corrected.

IV

SINCE THE UNDISPUTED FACTS SHOW THE DISCOVERY OF LODES IN CLAIMS MINERAL IN CHARACTER CONTAINING ORES OF HIGHER VALUE THAN SIMILAR ORES MINED IN THE UNITED STATES, IT WAS ERROR FOR THE DISTRICT COURT TO HOLD THAT THE EVIDENCE FAILED TO ESTABLISH A MINERAL DISCOVERY UNDER THE MINING LAW.

We agree with the Secretary's statement that, "The primary dispute in this case is not over the facts, but over the legal significance to be given to the established facts." R 24.

The statutes require that lands valuable for minerals shall be reserved for mineral entry (30 USC §21); that all valuable mineral deposits shall be open to exploration and purchase (30 USC §22); but that no location of a mining claim shall be made until the discovery of a vein or lode has been made within the limits of the claim located (30 USC §23).

In Jefferson-Montana Copper Mines Co., 41 L. D. 320, the Department outlined the elements of a valid discovery as follows:

1. There must be a vein or lode of quartz or other rock in place;
2. The quartz or other rock in place must carry gold or some other valuable mineral deposit;
3. The two preceding elements, when taken together, must be such as to warrant a prudent man in expenditure of his time and money in the effort to develop a valuable mine.

The three elements of a valid discovery were established by evidence offered by the Government in its case.

a. First, lodes were discovered. The lodes on the Edith and Paymaster claims are approximately half a mile in length. Exhibit C. See original scale R 152. They are on a major fracture in the earth's crust. Tr. 75. The fracturing makes an underground plumbing system for mineral solutions to come up from below and form veins. Tr. 74. A sulphide zone extends through the Edith and Paymaster claims. Tr. 75. This is a favorable factor which would induce development of the claims. Tr. 75. On the Edith there are parallel veins, some larger than others. Tr. 74. Whether the veins are productive in large quantities or small quantities of ore is yet to be determined. Tr. 75. Massive sulphides of base metals are in the sulphide zone on the claims. Tr. 40. See pp. 8-11 this Brief.

"Sulphide zone" is defined as "That part of a lode or vein not yet oxidized by the air or surface water and containing sulphide minerals." American Geological Institute Dictionary of Geological Terms, Doubleday & Company, Inc., N. Y, (1962).

The courts have defined the term "lode" as used in the statute authorizing the location of mining claims. A body of mineral or mineral

bearing rock in the general mass of the mountain, so far as it may continue unbroken and without interruption, may be regarded as the lode, whatever the boundaries may be. In the existence of such a body, and to the extent of it, boundaries are implied. On the other hand, with well definited boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode. Cheesman v. Shreeve, 40 Fed. 787, 795, 17 Morr. Min. Rep. 260.

b. Second, Valuable minerals were discovered in the lodes. Gold, silver, copper, lead and zinc minerals of commercial grade were found in the lodes. Exhibit 27, R 126, Exhibit 28, R 127. See pp. 11-13 this Brief.

The Government's witnesses established by their own testimony in the Government's case in chief that:

i. The average value of the ores discovered in the lodes on the claims exceeds the average value of the same ores mined in the United States.

ii. The average value of lead and zinc ores mined in the United States is $12 to $14 per ton (Tr 117), and the average for copper ores mined in the United States is $6 per ton (Tr 118).

iii. The Government's samples of the lode on the Edith claim average $31.10 per ton. (Exhibit 28) R 20

iv. The Mining Claimant's 22 samples of the lode on the Edith claim average $56.64 per ton. (Exhibit 28) R 20

v. The Government's sample of the ore in the lode on the Paymaster claim was $29.50 per ton. (Exhibit 27) R 20

vi. The Mining Claimant's samples of the ore in the lode on the Paymaster claim averaged $122.25 per ton. (Exhibit 27) R 20

vii. Mr. Suchy, Mining Engineer for the Government, advised Mr. Converse to spend time and money doing further bulldozing and drifting on the vein. Mr. Converse' reliance on this advice is justified. Tr 100.

viii. Mr. Suchy, as a prudent man, said if the claims were his, he would do bulldozing and drifting on the vein. It would be justifiable to spend more money on the property in an effort to determine the extent of the ore body. Tr 100, 101.

The decision of the Trial Examiner was affirmed by the Secretary. And the Secretary thus adopted two requested findings which this court may wish to accept as establishing minerals of sufficient value in the lodes as being discoveries as a matter of law. The Examiner found that six samples taken by the mining claimant from or near the discovery cut in the north half of the Edith claim were taken from the mineral parts of the vein at the places indicated on Exhibit 28. They average $36.42 per ton. Tr 23, Ex. 28, Finding No. 7, see page 20 of this brief. And this finding, approved by the Secretary, shows average values approximately three times the average values of similar ores mined in the United States. Tr 117, 118.

The Examiner found that four samples taken by the mining claimant and one taken by the Government in the adit on the Paymaster claim averaged $74.20 per ton. Ex. 27, Finding No. 14. See pages 23 and 24 of this brief. And this finding, affirmed by the Secretary, shows average values approximately five times the average values of similar ores mined in the United States. Tr 117, 118.

As a matter of law, the Department determined in Woodard and Belisle that lower values in lodes were sufficient discovery. The same kind of

minerals were found in those cases as in the present one. In each of those cases, the Government rejected the evidence of the Government's specialists. And based upon the evidence of the mining claimant decided that mineral discovery had been established as a matter of law. A copy of the Woodard decision was placed in this record by the appellee R. 195. The Belisle decision has been placed in this record by the appellant R. 266.

In United States v. Woodard, Oregon Contest 172, 173 (1957) it was held that:

> "In regard to the Sampson claim, more substantial evidence of mineralization was found. Three out of four mineral examiners found assay values from $4 per ton for a 50 inch sample to $28.29 per ton for a 10 inch sample (Table A) in a vein structure with both width and consistency. I conclude that the evidence of mineralization is sufficient to justify the belief that there is a reasonable prospect of success in developing a valuable mine on this claim and that there has been a valid discovery. Accordingly, the Sampson, together with the Fraction Amended and Luckey Strike are declared valid lode mining claims."

In United States v. Belisle, Colo 034358 (1966), a case under the Surface Resources Act, it was held that:

> "Mr. Roberts testified that ore having a value of $20 a ton is a working proposition. The sample taken from the Black Dragon by Mr. Belisle in 1965 from near the surface contained minerals of considerably higher value than $20 a ton. The sample taken from the Black Jack claim in 1950 showed values of $49.90 per ton. Add to this evidence the evidence of the mineral exposed in the workings underneath the Black Jack and it is clear that the mining claimant has successfully refuted the prima facie case presented by the Forest Service."
>
> "The ' prudent man' rule as expressed in Castle v. Womble, 19 L. D. 455 (1895) is that a valid discovery of mineral has been made where the evidence is of such a character that a person of ordinary prudence

> would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. In the present case, the evidence shows clearly that this test has been met, indeed exceeded, by the mining claimant."

c. Exploration and development work mean the same thing insofar as they relate to the effort to make a mine out of a particular ore deposit that has been discovered. By equating "prospecting" with "exploration work" the Assistant Solicitor departs from long-established rules of property. And if his decision stands, mining titles are placed in jeopardy. His decision departs from the established law of discovery and makes discovery depend upon whether the kind of further work justified to be done on the claims is called "exploration" or "development". After a discovery of a lode containing valuable minerals has been made, it is immaterial whether the further work done on that particular mineral deposit is to delineate the extent of the ore body and is called exploration, or whether the work is making the stopes ready to extract the minerals from the deposit and is called development. Either kind of work contributes to make a mine of the property.

The Solicitor's error is his definition of exploration work as being "that which is done prior to discovery in an effort to determine whether the land contains valuable minerals" R25. In our case here, the Government has establishe by its evidence that the land does contain valuable minerals and the average value of those minerals exceeds the average value of similar minerals mined in the nation. Hence the rationale of the administrative decision is erroneous. It is not correct to say that if the further work a reasonably prudent man would

be justified in performing is exploration work, he has not made a discovery, but if it is development work, he has.

The Government's expert, Mr. Suchy, testified that exploratory work and development work overlap, (Tr 89). He said that the same kind of work may be either exploration work or development work. Driving a shaft in country rock may be either development or exploration (Tr 89). Likewise, a crosscut, whether in ore or not, may be described as development or exploration (Tr 90). Diamond drilling (Tr 89), drifting (Tr 89) bulldozing (Tr 85) may be development work or exploratory work. Therefore, since the terms development and exploration overlap, the courts have wisely considered them as having an equivalent meaning with relation to the law of discovery.

The case of Charlton v. Kelly 156 F. 433, 436, (9th Cir. 1907) clarified the statement of the prudent man rule in the Castle v. Womble, 19 L. D. 455 (1894) case and in Chrisman v. Miller, 197 U.S. 313 (1905) by explaining that the word "development" was used there as the equivalent of "exploration". This interpretation of the rule was quoted with approval by the Department in the more recent case of U. S. v. Mouat, 61 I. D. 289, R.79

In Charlton the court said at page 436:

> "The principal objection made to the charge on this branch of the case is that the court instructed the jury that the mineral discovered must, in order to constitute a discovery, be of such quantity and character and found under such circumstances as to justify a man of ordinary prudence in the expenditure of his time and money in the development of the property. It is argued that a discovery sufficient to justify the expenditure of time and money in the development of a

> mining claim must necessarily be greater than that which is necessary to justify the expenditure of time and money for the purpose of exploration, with the reasonable expectation that, when developed, the claim will be found valuable as a placer mining claim. Counsel for the plaintiffs in error have assumed for the word "development" a broader meaning than was intended in the charge. The court did not mean that, in order to comply with the law, there must be such a discovery as to justify the expenditure of time and money upon a claim to the extent of opening up the whole thereof and acquiring an exhaustive knowledge concerning its resources. The word as it was used by the court, and as in connection with the whole charge it must have been understood by the jury, was equivalent to the word "exploration", and was used in the sense in which it was employed in Chrisman v. Miller, 197 U.S. 313, 323, 25 Sup Ct. 468, 470, 49 L. Ed. 770, in which the court thus quoted with approval the language of Mr. Justice Field in a prior case: "The mere indication or presence of gold or silver is not sufficient to establish the existence of a lode. The mineral must exist in such quantities as to justify the expenditure of money for the development of the mine and the extraction of the mineral." (Italics supplied)

d. Standard for Discovery. The Department has failed to apply correctly to the facts found in the present case the standard for discovery set forth in Castle v. Womble, 19 L. D. 455 (1894). We agree with the long-established interpretation of Castle v. Womble by Curtis H. Lindley in his Treatise on the American Law Relating to Mines and Mineral Lands (1914), a recognized authority on the subject, often quoted by the courts. He says in Vol. 2, (3rd ed) at page 36:

> "The land department, whose function it is to determine in all applications for patent what constitutes a discovery, has uniformly adopted a liberal rule of construction. In the judgment of the tribunal, a mineral discovery sufficient to warrant the location of a mining claim may be regarded as proven when mineral is found and the evidence shows that a person of ordinary prudence would be justified in further expenditure of his labor and means with a reasonable prospect of success." Lindley cites Castle v.

Womble, 19 L.D. 455; Walker v. SPRR Co., 24 L.D. 172; Michie v. Gothberg, 30 L.D. 407, Chrisman v. Miller, 197 U.S. 313, 322, 25 Sup. Ct. Rep. 468, 49 L ed 770; Charlton v. Kelly, 156 Fed. 433, 436, 84 S Ct. Rep. 468, 49 L ed. 770; Lange v. Robinson, 148 Fed. 799, 803, 79 CCA 1; Garibaldi v. Grillo, 17 Cal. app. 540, 120 Pac. 425, 426; Madison v. Octave Oil Co., 154 Cal. 768, 99 Pac. 176, 178; In re Yard, 38 L. D. 59.

In the present case, the Department is actually imposing a requirement that a developed immediately mineable body of ore be found to support mineral discovery at the same time that it disavows doing so. At page 5 of his decision, in the administrative file Exhibit 1, the Assistant Director wrote:

> "Contrary to the claimant's assertion, the Department does not require a showing that a mining claimant has encountered a deposit which would be commercially profitable immediately. A valuable mine need not be a profitable one. Nevertheless, 'the nucleus of value which sustains a discovery must be such that with actual mining operations under proper management a profitable venture may reasonably be expected to result'. United States v. Santiam Copper Mines, Inc, A-28272, June 27, 1960."

That prize bit of double talk reasserts that "discovery" means a deposit ready to be mined. Both the Assistant Director and the Assistant Solicitor take shelter behind the Administrative Decision A-28278, July 17, 1961, U. S. v. Clyde R. Altman et al., 68 I. D. 235.

The Altman case is like the Santiam case, a link in the chain of administrative precedents created in recent years in order to alter the Castle definition and expand the discovery requirement. The Solicitor's quotation from Altman equates "exploration work" to "prospecting" by defining it as "that which is done prior to a discovery in an effort to determine

whether or not the land contains valuable minerals." It holds that discovery is not accomplished until the exploratory work has determined that minerals exist in such quantities that it will pay to mine them. See Assistant Director's opinion p. 5 and Assistant Solicitor's opinion p. 9. Adm. File Ex. 1.

We are concerned here with a major structure, a lode of major proportions, not with stringers, pods, veinlets or lenses of no more than a few hundred pounds of ore, as was found by the Secretary in the Pruess case Contest 0-213 Oregon 1960, Affd A 28641 August 22, 1965. In Pruess it was held that:

> "Under the prudent man rule the actual discovery of valuable ore is not essential to a sufficient and adequate discovery. A valid discovery is made where there is discovered a mineral-bearing vein possessing in and of itself a present or prospective value for mining purposes."
>
> "Even though pay ore is not exposed, the validity of discovery would be established if the evidences of mineralization are such as would induce a prudent man in further expenditures in the probability that the veins exposed will lead to greater values if mining operations for the exploitation of the claims are undertaken. By "probability" we do not mean mere conjecture, hopes or beliefs that a deposit may exist - but if similar geological conditions elsewhere have led to greater values at depth, then it would appear that a prudent man would be justified in undertaking mining operations to follow the lode in the anticipation, the probability, of encountering richer (commercial) values in those claims." P. 5

In the case of Narver v. Eastman, 34 L. D. 123 (1905) quoted with approval in U. S. v. Mouat, 61 I. D. 293 (1954). The Secretary pointed out: "It does not follow that because there is no clear profit arising from the sale of an article that has been manufactured or produced, that it therefore has no

commercial value." In that case, the cost of quarrying and transporting building stone was shown to be about five times the price the stone would bring at the then current market. The claimant's stone application was allowed in spite of a finding below that these costs left the stone without any commercial value whatsoever. The Secretary held that the commercial value of an article does not depend upon whether it can be produced and sold at a profit.

Sufficient of the thing itself must be found, within the claim, and not just in the neighboring area, to justify the prospector in making further efforts to obtain more of that mineral from that particular deposit. Cascaden v. Bortolis, 162 Fed. 267; Jefferson-Montana Copper Mines Co., 41 L. D. 320; Chrisman v. Miller, 25 S. Ct. 468.

For the foregoing reasons, we respectfully submit that the court below erred in holding that "Manifestly, the testimony of the Government's witnesses was sufficient to create a prima facie case in favor of the Government's position." R 46. For a discovery was established by the Government as a matter of law, and the court below should have so corrected the administrative decision.

V

SINCE THE SECRETARY UPHELD THE EXAMINER'S DENIAL OF MINING CLAIMANT'S RIGHT TO MAKE OFFERS OF PROOF FOR THE RECORD ON APPEAL, THE COURT BELOW ERRED IN UPHOLDING THE DECISIONS OF THE SECRETARY

The Examiner ruled that the Mining Claimant could not make offers of proof for the record by stating into the record evidence he proposed to offer. Exceptions were saved to the denial of the right to make offers of proof with respect to the testimony of Dr. Albert J. Walcott, Tr 174; of Mr. Converse Tr 24, 25; of Mr. Suchy, Tr 58 - 61 and Tr 67: and of Floyd Persons, Tr 143, 148.

The Mining Claimant made his position clear to the Hearing Examiner below that it would be error to refuse Mining Claimant the opportunity to make offers of proof for the record on review. The following quotation of the record shows this:

> MR. MURRAY: "Well, we make our usual offer under the rule on this evidence, and I suppose there will be the same ruling."
>
> HEARING EXAMINER HOLT: "That's correct. Under what rule?"
>
> MR. MURRAY: "Under the rule that permits us to make our record for appeal. Unless the witness is permitted to testify, the Examiner on appeal cannot determine what the answer to the question would be, and, therefore, if there should be error in sustaining the objection, then the Claimant has no way of showing what the evidence would be, had he been permitted to testify, unless he is permitted to testify over the objection, and the rule, as I understand it, is a well recognized rule, and you can always show what the testimony is, subject to the objection, and for the purpose of making a record."
>
> "Otherwise, it would be entirely possible to sustain an objection to any evidence being offered by the Mining Claimants, and then, on review, there would be nothing before the Examiner to review unless

the Mining Claimant went further over the objection and put into evidence the facts supporting his side of the case."

"It's tantamount to a denial of due process to refuse to permit a Mining Claimant in a proceeding of this kind the right to introduce his evidence. Certainly, it might be objectionable evidence in the view of the Examiner, but, in the view of a reviewing body on appeal, It might be deemed proper evidence, but to prohibit the Mining Claimant from making his record, certainly, is a denial of due process."

HEARING EXAMINER HOLT: "All right."

MR. MURRAY: "That's what it amounts to when we are denied the right to offer evidence to make our record here, the denial of a right to be heard on an appeal, as well as at this stage of the proceedings.

HEARING EXAMINER HOLT: "All right. The ruling has been made. Let's proceed."

MR. MURRAY: "We'll have to take an exception to this whole line of ruling on the part of the Hearing Examiner because---on the grounds that we are being denied a hearing, denied the right to present the pertinent evidence on appeal, and we save that exception to all the previous rulings on this same objection or line of objections that have been made."

HEARING EXAMINER HOLT: "Very well."

MR. MURRAY: "For the purpose of the record, it's my understanding that the ruling is that we are not permitted to make offers of proof, or to make a record."

HEARING EXAMINER HOLT: "Not in the manner suggested by Counsel." Tr 148-150.

The Administrative Procedure Act, 5 U.S.C. §1005 (b) provides that, "The agency shall afford all interested parties opportunity for (l) the submission and consideration of facts..." This the Department refused to allow.

In Downie v. Powers et al, 193 F 2d 760 (10th Cir. Dec. 20, 1951), it was held that the spirit of the mandate of the Rule 43 (c) 28 USCA permitting offers of proof of excluded testimony to be made for the record cannot be ignored. The purpose of the rule permitting the examining attorney to make a specific offer of what he expects to prove by the witness' answer to an excluded question is to enable the examining attorney to make such a record that an appellate court can determine whether there was reversible error in excluding the question. See Moore's Federal Practice, Vol 3, p. 3076.

In Pennsylvania Lumberman's Mutual Fire Insurance Co. v. Nicholas, 253 F ed 504, 506, the court said:

> "Appellants also complain of the refusal of the trial court to permit them to prove or even make their proffer of proof as to certain of their other defenses. Of course any evidence they wish to tender that would tendto establish their defenses should be received by the court, and as to any which the court considers irrelevant, immaterial or otherwise improper, the parties must be given ample opportunity to put in the record a fair statement so that the appellate courts can intelligently pass upon the challenged rulings of the court."

Mining claimant was denied opportunity to put into the record the testimony of Mr. Suchy as to the dimensions in width, length and depth of ore he sampled, from which the number of tons of ore could be calculated. With three dimensions, the witness could have calculated a body of ore based upon his sampling of the lode. The transcript is as follows:

> "Q (By Mr. Murray): What would be the reasonable projection of the depth of the ore that you found at E-28 and E-21, or either one of those points, if there is any difference in what would be the reasonable projection of the ore in determining either the indicated ore, or the inferred ore?

Mr. Clarke: I object, Mr. Hearing Examiner. There has been no showing so far that there's any ore; secondly, again, we are going into matter that are not the subject of direct examination. We're exploring the development work, the exploration work that has been completed subsequent to the passage of Public Law 167.

Hearing Examiner Holt: The objection is sustained.

Mr. Murray: I will ask the witness a question over the objection for the purpose of preserving my record and making an offer of proof.

Hearing Examiner Holt: All right, denied. Tr 64-67.

It was particularly prejudicial to deny mining claimant opportunity to preserve in the record for review the testimony of Dr. Albert J. Walcott, who had earned his doctorate in mineralogy. When he started to give the results of his on the ground examination, the contestant objected. The objection was sustained. The examiner refused to allow claimant to make an offer of proof to show on appeal what the doctor's testimony would be were he permitted to testify. An exception was taken to the Examiner's ruling. Tr 174.

To us, justice points to a denial of "Due Process". And here, the mining claimant will not be met with the administrative objection that a constitutional question cannot be raised for it is forbidden by the rules of practice of the Department of Interior. Tr 6, 7.

VI

SINCE THE MINING CLAIMANT'S REQUESTED FINDINGS 9, 10, 11, 13, 16 AND 17 WERE MATERIAL TO THE ISSUES AND WERE SUPPORTED BY SUBSTANTIAL EVIDENCE UNDENIED, THE COURT BELOW ERRED IN FAILING TO CORRECT THE ADMINISTRATIVE DECISION AS TO EACH SUCH REQUESTED FINDING.

We do not ask this court to weigh the facts. We ask that the proper rules of law be applied to the established facts. First, was there error in rejecting requested findings 10 and 11 as immaterial? Second, can mere assumption be made to substitute for substantial evidence?

Requested Finding No. 10. The Government's assays of four samples averaging $31.10 per ton were taken by Mr. Suchy from the fracture zone structure on the Edith claim in the area of an outcrop south of the McQuad Creek. Tr 53-56, Exhibit G. The assays are listed on page 21 of this Brief.

Requested Finding No. 11. The mining claimant's assays of sixteen samples averaging $66.24 per ton were taken on the Edith claim in an area south of the McQuade Creek. Exhibit 28. See assays of sixteen samples and the value of each on page 22 of this Brief.

All of the samples assayed and listed in the requested findings were received in evidence. But they were rejected and not taken into account by the department in making its decision. These samples taken after July 23, 1955, the effective date of the Surface Resources Act, did not evidence a new discovery and should not have been rejected on that pretext. Since the lode had been discovered prior to the effective date of the act the Government's samples and the mining claimant's samples of the same lode in the

south half of the Edith claim should have been considered as evidence establishing the value of the minerals in the discovered lode. Digging into the ground to expose fresh rock in place and cutting a sample from that rock in a discovered lode does not constitute a new discovery. Such sampling merely confirms the mineral values in the lode already known to exist. The fact that a lode did exist has been established. See pp. 8-15 and pp. 44-45.

Requested Finding No. 9. In 1951 an outcrop was discovered in the southerly part of the Edith Claim. Work was done on the outcrop before the access road was constructed. Fresh rock at this point exposed the same vein also seen in the cut to the north near the middle of the claim. Tr 192-196. The Government's evidence established that a sulphide zone or lode extended through the Edith Claim.

Ford M. Converse testified for the Government. Since there is nothing in the record to show that he was called as an adverse witness, the Government is bound by his testimony. He located the Edith and Paymaster claims in 1951. Tr 9. In the last five years he has spent $10,000 developing the claims. Tr 206, 207. Mining claimant's exhibits 1 through 22, assay certificates, were received in evidence on stipulation of counsel. Tr 8. The red circles on the maps of the Paymaster and Edith claims show the places where samples of ore were taken. The numbers in the red circles correspond to the exhibit numbers of the assay certificates shown on the table of assays of samples on exhibit 27, map of the Paymaster, and exhibit 28, map of the Edith claims. Tr 18, 19, 21, 22.

There was no evidence offered by the Government to deny or contradict that an outcrop was discovered and work was done on it in the southerly part of the Edith claim many years before the road was put in. Tr 193, 194. Fresh rock at this point exposed the same vein also seen in the cut to the north near the middle of the claim. Tr 192-195. Mr. Leonard referred to Exhibit E. He said he knew and others also knew about 1926 that there was an outcrop in the south half of the Edith claim at the points indicated, Ex. 28, Ex. 25, Ex. 21 on Exhibit E. The outcrop of ore in the southern half of the claim was connected up with the vein exposed at the discovery cut, Post No. 1 in the north half of the claim, Ex. 28. The same lode that was exposed at the point in the road by Ex. 28 south of McQuade Creek on the southern half of the Edith claim. Tr 194-195.

Richard A. Smith testified that he found the vein along the lode line all the way through the claim. Tr 185. He has been a miner for about 30 years who had done a lot of prospecting and who had worked on the claims, put a cross on Exhibit 28, map of the Edith, showing where sample 33 was secured in the south half of the Edith. Mr. Clarke objected to the exhibit as coming from a road cut and a place which has been shown to have been exposed subsequent to 1955. The Examiner overruled the objection and said: "Well, now, this witness has testified that he found the vein along the lode line all the way through the claim. But he did not take this sample of the stipulated value from $38.80 to $57.00 into account in his decision,

nor did the Assistant Solicitor do so in his opinion written for the Secretary.

Requested Finding No. 13. That on the Edith claim there is a vein of quartz or rock in place. The quartz or other rock in place carries gold, silver, copper, lead and zinc. We also requested that the conclusion be made that the occurence would justify a prudent man in the expendure of his time and money in the effort to develop a valuable mine. This request was denied for the reasons set forth in the administrative decisions. Actually there was no denial of the facts in the decision but merely a failure to conclude as requested.

Requested Finding No. 16. Requested that a finding be made of a discovery on the Paymaster claim. This was likewise denied for reasons set forth in the decision. But actually there was no denial of the facts just a conclusion about the facts.

Requested Finding No. 17. On the Paymaster claim there is a vein or lode of quartz or rock in place which carries gold, silver, copper, lead and zinc. This is not denied. But the conclusion requested was denied in the decision. The Examiner held, "there was sufficient evidence of mineralization to induce a prudent man to retain the claims until a road had been constructed and until more extensive exploration had been completed". Adm. File, Decision of January 29, 1963, p. 8. In arriving at this decision the Examiner did not take into account the assays of samples listed in requested findings 10 and 11, pages 21, 22 of this Brief.

Bound as we all are by the record in this case, it seems reasonable to conclude that agency assumptions are no substitute for evidence. An administrative decision based on assumption and not upon substantial evidence should be corrected.

VII

SINCE IT APPEARS FROM THE NOTICE OF HEARING OF FEBRUARY 14, 1962, THAT THE CHARGE OF WANT OF DISCOVERY WAS ASSERTED BY THE HEARING EXAMINER OVER HIS SIGNATURE AT THE REQUEST OF FORESTRY, THE PROSECUTING AGENCY, THE COURT BELOW ERRED BY FAILING TO HOLD THAT MINING CLAIMANT'S MOTION FOR CHANGE OF HEARING EXAMINER SHOULD HAVE BEEN ALLOWED UNDER THE ADMINISTRATIVE PROCEDURE ACT, 5 USC §1004 (c).

The Administrative Procedure Act specifically forbids the Hearing Examiner from acting under the direction of those engaged in the prosecuting function. The court below erred in equating the notice of hearing, to a pre-trial order because a pretrial order contains a statement of the contentions which each party proposes to prove. The notice of hearing signed by Examiner Holt presents the charges asserted at the request of forestry, the prosecuting agency.

A hearing examiner shall not be subject to the "....direction of any officer, employee, or agent engaged in the performance of investigating or prosecuting functions for any agency". (underscoring supplied). 5 USC 1004(c) This clear command forbids a hearing examiner from acting under direction of those engaged in the prosecuting function, and representing "any agency" in the "prosecuting function".

The House Committee on the Judiciary, House Report No. 1980, May 3, 1946, when considering the Administrative Procedure Act, commented that when the same men are obliged to serve both as prosecutors and judges: "This not only undermines judicial fairness; it weakens public confidence in that fairness. Commission decisions affecting private rights and conduct lie under the suspicion of being rationalizations of the preliminary findings, which the Commissioner, in the role of prosecutor, presented to itself." U.S. Code Cong. and Adm. Service, 79th Cong., 2d Session (1946).

The record speaks for itself:

"Mr. Murray: Mr. Hearing Examiner, for the purpose of the record at this time, we would like to file under the Administrative Procedure Act, Title 5, Section 1006 (a), a motion to change the Hearing Examiner, supported by the affidavit of Mr. Ford Converse.

I will hand the original to the Hearing Examiner and a copy of the motion to Counsel.

....

"Mr. Clarke: Mr. Hearing Examiner, I object to this motion. I think it is strictly self-serving. It shows no basis in fact of prejudice on the part of the Hearing Examiner.

"Hearing Examiner Holt: I am going to deny the motion. I think, if you had filed it ten days or so ago, I could have had a different Hearing Examiner at the hearing.

"Mr. Murray: We had no way of knowing who was going to be the hearing examiner until this morning, and therefore, the motion could not have been filed previously.

"Hearing Examiner Holt: All right. The motion is denied.

....

"Hearing Examiner Holt: <u>I don't deny the facts</u>. I just deny the motion. You may make an offer of proof, if you care to. (Emphasis supplied)

"Mr. Murray: The offer of proof, of course, could take two forms. One would be to call the Hearing Examiner to testify and offer that testimony, or we could state what we propose to prove, and the Hearing Examiner can act upon that statement.

"Hearing Examiner Holt: You may state what you propose to prove.

"Mr. Murray: We propose to prove the averments of Mr. Converse in his affidavit by the testimony of the Hearing Examiner; in support of the motion, that the case, in effect, has been pre-tried, and, therefore, this hearing would be more or less a vain and useless gesture, as well as the other averments of facts and conclusions averred in the affidavit of Mr. Converse." Tr 34, 4, 5.

CONCLUSION

There are several good reasons why this court may wish to correct the decision below.

When Congress delegates agency power and spells out the procedures under which that power may be exercised then it would seem desirable that our courts should enforce those safeguards.

The expertise of the courts better qualifies them to decide law. Especially is this so when property rights are involved. Since titles to all mining claims are made to depend upon the discovery requirement it would seem important for our courts to correct all administrative attempts to depart from the established law.

Basic to the rights of every citizen is the right to be heard. A citizen denied the right to make offers of proof for a record on appeal is a denial of the right to be heard. It is a denial of "Due Process".

It would seem desirable to correct the administrative holding which

ationalizes to itself its own conclusion by dividing the established facts in wo parts and rejecting that part which does not support its position.

The Administrative Procedure Act applies to every delegation of agency power and its purpose is to set up standards of fair dealing with citizens in an ever increasing powerful bureaucracy.

Respectfully submitted,

William B. Murray
Attorney for Appellant
525 Failing Building
Portland, Oregon 97204
226-3819

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

William B. Murray
Attorney for Appellant